

JUDICATURE ACTS.



THE NEW
PRACTICE & PLEADING.



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JUDICATURE FORMS.

The Forms of Proceedings and Pleading requisite under the Acts of 1873 and 1875, in accordance with the latest Rules of Court, Printed upon the Special Judicature Paper, are now in course of preparation, and will be ready in a few days; and settled for the use of Solicitors, by

W. T. CHARLEY, Esq., M.P., D.C.L. (Oxon).,

Of the Inner Temple, Barrister-at-Law.

FORM CASES

FOR HOLDING THE ABOVE FORMS, 12 & 20 DIVISIONS.

JACOB PHILLIPS & SON,
CHIPPENHAM, WILTS,

THE NEW SYSTEM

OF

PRACTICE AND PLEADING

UNDER THE

SUPREME COURT

OF

JUDICATURE ACTS, 1873 & 1875.

BY

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and "The Land Transfer Act, 1875."

LONDON:

WATERLOW AND SONS,

BIRCHIN LANE, PARLIAMENT STREET, AND LONDON WALL.

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TO

T. HENRY BAYLIS, ESQUIRE,

ONE OF HER MAJESTY'S COUNSEL,

WHO UNITES TO AN INTIMATE ACQUAINTANCE WITH THE EXISTING SYSTEM

OF PRACTICE AND PLEADING OF THE SUPERIOR COURTS OF LAW,

AN EXPERIMENTAL KNOWLEDGE OF

THE SCIENCE OF SPECIAL PLEADING,

AS IT EXISTED ANTERIOR TO THE COMMON LAW PROCEDURE ACTS,

THIS ATTEMPT TO ILLUSTRATE AND EXPLAIN THE

NEW SYSTEM OF PRACTICE AND PLEADING UNDER THE

SUPREME COURT OF JUDICATURE ACTS,

IS (WITH PERMISSION) INSCRIBED BY

HIS AFFECTIONATE PUPIL.

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THESE ARE THE RESULTS OF THE INVESTIGATION

IN THE CASE OF THE

THESE ARE THE RESULTS OF THE INVESTIGATION

JACOB PHILLIPS & SON,
CHIPPENHAM, WILTS.

PREFACE.

IN 1874 a work entitled, "The Practice under the Judicature Acts, 1873 and 1874, containing the Acts, with notes and references, an abstract of the Acts, the Rules of Court, forms of proceedings, forms of pleadings, and a copious Index," was projected by the late "John T. Hughes, Esquire, of the Middle Temple, barrister-at-law." Mr. Hughes, after writing a careful abstract of the Supreme Court of Judicature Act, 1873, and of the Supreme Court of Judicature Bill, 1874, and some useful explanatory notes to the more important sections of the former measure, lost his life, unfortunately, in a railway accident. His unfinished MS. was placed in my hands near the close of last Session, with a view to its adaptation to the legislation of 1875. The Supreme Court of Judicature Act, 1875, has repealed a considerable portion of the Supreme Court of Judicature Act, 1873; while the Supreme Court of Judicature Bill, 1874, was withdrawn near the close of the Session of last year. I found it necessary to re-write the entire work, and for the present volume I am solely responsible. The abstract has been omitted from want of space. By means of short annotations to every section and every Rule of the new Acts, I have endeavoured, in a very simple and unpretending way, but, I trust, with a due regard to accuracy of quotation and reference, to explain the new system of pleading and practice, and to

point out the changes effected by it in the previously existing law. The work is the result of severe and sustained labour. I am fully conscious of its many imperfections and shortcomings, but, such as it is, I submit it to the public and the profession, hoping that it may prove of some slight use to them in their efforts to unravel the intricacies of the fusion of the once rival, but at length blended, systems of procedure in law and equity.

W. T. C.

5, CROWN OFFICE ROW, TEMPLE,

October 1st, 1875.

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NOTANDA.

P. 284.

TESTE OF WRIT.

"Witness, &c.," is the abbreviated form of *teste* given in Appendix (A), Part I, No. 1 of the Schedule to the Supreme Court of Judicature Act, 1875. The form given in the Schedule (A), No. 1, of the Common Law Procedure Act, 1852, is similarly abbreviated. The form of *teste* given in Appendix (F), No. 2, to the writ of *elegit* is, "Witness ourselves at Westminster, &c.," to the writ of *Venditioni exponas*, "Witness ourself at Westminster the day of in the year of our reign." This form is identical with that given in Schedule (E) of the Consolidated Orders of the Court of Chancery as the *teste* to the writ of *subpœna* in that Court. It cannot be supposed that there will be one form of *teste* for a writ of summons and another form of *teste* for a writ of execution, under the new practice. The word "ourself"* or "ourselves" occupying the space appropriated in a Common Law writ to the name of the Lord Chief Justice or the Lord Chief Baron, it follows that the name of the Lord Chancellor must be inserted elsewhere. The forms in Appendix (F) afford no clue to the position which the name of the Lord Chancellor is to occupy, but the writ of *subpœna* in Chancery does afford such a clue. The name of the Judge in Chancery attesting a writ of *subpœna* is placed at the end of the *teste*, thus, "Romilly, M.R." It may, therefore, be assumed that the full form of the *teste* both of a writ of summons and of a writ of execution, will be "Witness ourself at Westminster the day of in the year of our reign."

"Cairns, C."

P. 290.

ADDRESS FOR SERVICE BOOK.

In the Masters' Office* two "Address for Service Books" are kept, one pursuant to section 165, and the other pursuant to section 166 of the Reg. Gen. Hil. T., 1853. The former is called "The Solicitors' Address for Service Book," the latter, "The Plaintiffs' and Defendants' Address for Service Book." The "Solicitors' Address for Service Book" in the office of the Masters of the Common Pleas, is a rather venerable-looking document, most of the entries having been made many years ago. The "Plaintiffs' and Defendants' Address for Service Book" is, on the other hand, quite a fresh-looking document, the entries being made almost daily. The names and addresses of the plaintiffs and defendants are entered indiscriminately. The form is as follows:—

Date.	Cause.	Address for Service.
Nov. 1st, 1874. Nov. 2nd, 1874.	Robinson ats. Jones. Williams v. Brown.	5, Upper Smith Street. 2, Lower John Street.

The first entry is, of course, that of a defendant's address for service, the second entry is that of a plaintiff's. The entries are made irrespective of any alphabetical order, just as the plaintiff or defendant calls at the office. The searches for the addresses for service of plaintiffs are made according to the date of the writ; the searches for the addresses for service of the defendants is made according to the date of the appearance. The date, it will be perceived, occupies the first column.

* The writer desires to acknowledge the courtesy with which the Chief Clerk of the office of the Masters of the Common Pleas placed valuable information on points of practice at his disposal.

CAUSE BOOKS.

The Chancery Cause Book assumes an important position in the new practice. It is to supersede the Common Law "Writ Book," and "Appearance Book," and to some extent, the "Judgment Book," also. The form of the "Cause Book" is as follows:—

Names, &c., of Plaintiff's Solicitor.	Parties' Names.	Appearances and Defendants' Solicitor's Names.	Interrogatories, Answers, Exceptions, Replications, and Depositions.	Folios.	Memo- randa of Service.	Consents, and Record and Writ Clerk's Certificate.	Orders and Decrees.	Reports and Certificates.		
									Nature of docu- ment.	Date.
(The Date and Number of the Name of the Judge are also inserted in this column.)			Nature of docu- ment.	Date of Filing.			Nature of docu- ment.	Date.	Reference to Regis- trar's Book.	

The "Cause Book" is thus an exhaustive summary of the whole proceedings in the cause from beginning to end, with this qualification, that the decree or order pronounced in the cause is not set out at length or even attempted to be summarised. The date only of the decree or order is inserted, supplemented by a "reference to the Registrars' Books."

The Registrars' Books are filled up at the Registrars' Office and sent over, as soon as filled up, to the Record and Writ Clerks' Office to be kept there. Every proceeding in the cause—down to interrogatories and motions *ex-parte*—is carefully set out *in extenso* in the Registrars' Books. These ponderous tomes will, in future, it is to be hoped, be less voluminous. About two-thirds of the matter inserted in them might, with advantage, be omitted. Common Law proceedings are, perhaps, not sufficiently placed on record, but there can be little doubt that the existing system of placing every proceeding in a cause, however trivial it may be, on record in the Chancery Registrars' Office, might be advantageously pared down to smaller dimensions.

The Record and Writ Clerks keep books in the nature of Indexes to the Chancery causes.

The following is the form of entry :—

Reference to Cause.	Name of Cause.	Name of Judge.
1873. O. 41	Jones <i>v.</i> Smith.	V. C. Malins.

The entry is under the name of the *plaintiff* (or first plaintiff) in alphabetical order. The book which the writer inspected was O to Z. The entries are, at first, made in paper books; but, at the end of three years the entries are transferred to very durable volumes of parchment.

Everything almost that is written or printed in the course of a Chancery cause is filed with the Clerks of Records and Writs; and some surprise has been expressed that there is no direction in the Judicature Act of 1875, that anything shall be filed, except a copy of the writ and certain affidavits, &c. The Acts speak of "delivering," not of "filing" the pleadings. Some allusions to filing pleadings in the repealed Schedule to the Judicature Act of 1873 are not reproduced in the Schedule to the Judicature Act of 1875.

The method of filing the pleadings in the Record and Writ Clerks' Office is very simple. The various documents, commencing with the bill and ending with the replication, are laid in chronological order, one upon the top of the other. Formerly the documents were "hooked," *i.e.*, strung upon a hook passed through the ends of the parchment, but this was, of course, discontinued, when parchment ceased to be employed. The little pile of documents in each cause is secured by a leathern strap fastened with a buckle, which is easily undone, when an examination of any document becomes necessary. The little piles thus strapped are placed carefully away in their appropriate pigeon holes.*

* The writer is indebted to Mr. Ward, the Record and Writ Clerk, for the opportunity of inspecting the method of keeping cause-books and indexes, and the method of filing proceedings in the Court of Chancery.

P. 318.

APPEARANCES AND PRÆCIPES.

The number of writs of summons issued by the Common Pleas during the quarter ending the 30th of June, 1875, was 5,220; the number of appearances entered to these writs, only 1,742. The respective numbers for the quarter ending the 31st of March were 4,561, and 1,650. The writs of summons issued from the same Court in 1874 were 17,348; the appearances to these writs, 6,045. These figures are the best justification of the practice of keeping the entries of writs and of appearances in *separate* books, which has hitherto prevailed in the offices of the Masters of the Courts of Common Law. In nearly two-thirds of the cases no appearance at all is entered. In a majority of cases the defendant surrenders at discretion at the first sight of the writ; and compromises or fully satisfies the plaintiff's claim. The practice in Chancery is wholly different. Causes commenced there are often of a friendly character; and those of a hostile character are generally fought out to the bitter end. It is only natural, therefore, that in Chancery the appearance should be entered in the same book as the title of the Bill. The only trace of a Common Law action which remains on record where the action proceeds no further than the issuing of the writ of summons, is the *præcipe*. The *præcipes* and appearance-pieces are now almost the only documents, except affidavits, filed in an action at Common Law. They are "filed" by being strung (just as they come in) upon a string, a mode of filing adopted with a view to facility of reference. The *præcipes*, when sufficiently numerous, are fastened together in a heap between two pieces of stout millboard, bent so as to protect the edges. The appearance-pieces are tied up, when sufficiently numerous, in brown paper parcels. The heaps of *præcipes* and parcels of appearance-pieces are labelled outside, so that they can be identified, when it is requisite to refer to them. The *præcipes* and appearance-pieces used to be kept for ten years at the Master's Office, and then sent to the Record Office to be permanently kept. Complaints, however, having been made of the difficulty of finding space at the Record Office for these constantly-accumulating documents, the Judges of the Common Pleas drew up and signed an instruction, dated 30th June, 1874, authorising the Masters of that Court to destroy the *præcipes* and appearance-pieces at the end of the ten years, instead of sending them over to the Record Office. What a contrast this presents to the Chancery practice! At either the Record and Writ Clerks' or the Registrars' Offices, a copy is kept of every document in each case. Where the only trace of an action at Common Law is the filed *præcipe*, even that trace disappears at the end of ten years.

In the case of a judgment for default of appearance, the Master did not tax the costs, as the amount was fixed by statute: in the case of a judgment for want of a plea or after a trial or a writ of inquiry, the Master taxed the costs, but only after judgment was signed and entered.* It will be perceived that in the form there are separate columns for the debt and the costs. The Master, when he had taxed the costs, entered the amount on the *postea* or the judgment paper, and initialed it. Until the Master's *allocatur*, the judgment was, technically, inchoate only. The initials verified the master's finding. Under the new system "a copy of all the pleadings" must be "delivered" to the officer before he enters the judgment (Order XII, Rule 1), a ceremony borrowed from the Chancery practice. The judgment is to be entered by the officer in an elaborate form, prescribed by Appendix (D). It is hardly likely that this book is to be *substituted* for the simple and short form of entry of judgment in use previously at the Master's office. The forms of judgment in Appendix (D) which vary in different cases would then have to be copied into the book at full length, a practice which would be analagous to copying in the *postea*, instead of the particulars which it contains.

The "motion for judgment" seems to be a resort to something like the old system of requiring a "rule for judgment," abrogated by the Common Law Procedure Act.

P. 404.

PAYMENT INTO COURT.

The system pursued in the Office of the Masters of the Court of Common Pleas differs from that adopted in the office of the Masters of the Queen's Bench. The solicitor takes the plea of payment into Court and the money to the Chief Clerk of the Masters, who pays the money into Child's Bank. When the money so lodged at that bank reaches a certain amount, the Chief Clerk draws a cheque upon the bank for it and lodges it in the Bank of England. When the plaintiff comes to take the money out of Court, the Chief Clerk pays him by a cheque upon the Bank of England, where there is always a balance of at least £10,000 standing to the Chief Clerk's credit.

THE SUPERINTENDENT OF THE COUNTY COURT'S OFFICE.

This Officer is preparing Rules for the purpose of carrying out the provisions of s. 89 of the Principal Act.

*The curious reason assigned for thus inverting the natural order of proceedings is that the solicitor might otherwise take his fee and not sign judgment at all.

P. 502.

SALE OF PERISHABLE GOODS, WARES AND
MERCHANDISE.

An illustration of this under the previous practice occurred recently (on the 31st August, 1875,) in the case of *Griffiths v. Miller*. Mr. Baron Bramwell made an order for the *sale of growing crops*, the sheriff (it was an interpleader case) paying the proceeds of the sale into Court, and the claimant proceeding to trial. The growing crops would otherwise, it is believed, have perished.

THE INCORPORATED LAW SOCIETY.

As the Registrar of Attorneys and Solicitors this Society is preparing Rules pursuant to s. 14 of the Amending Act, re-enacting, with certain not unimportant alterations, the regulations relative to the Preliminary, Intermediate and Final Examinations, to the admission and re-admission of Solicitors, and to the taking out and renewal of certificates to practice.

SUPREME COURT OF JUDICATURE ACT, 1873.



36 & 37 VICTORIA, CHAPTER 66.

An Act for the constitution of a Supreme Court,
and for other purposes relating to the better
Administration of Justice in England ;

*And to authorise the transfer to the Appellate Division of such Supreme
Court of the Jurisdiction of the Judicial Committee of Her Majesty's
Privy Council.*

As sections 21 and 55 of the present Act, which relate
to the Judicial Committee, are suspended by the 2nd
section of the Supreme Court of Judicature Act, 1875,
till the 1st of November, 1876, the latter part of the title
to this Act may be considered as similarly suspended.

WHEREAS it is expedient to constitute a
Supreme Court, and to make provision for
the better administration of Justice in England :

*And whereas it is also expedient to alter and amend the law relating to
the Judicial Committee of Her Majesty's Privy Council.*

The latter Clause of the Preamble may be considered as
suspended till the 1st of November, 1876:

Be it enacted by the Queen's most Excellent
Majesty, by and with the advice and consent of
the Lords Spiritual and Temporal, and Commons,

in this present Parliament assembled, and by the authority of the same, as follows :

PRELIMINARY.

SECTION 1.—*Short Title.*

This Act may be cited for all purposes as the “Supreme Court of Judicature Act, 1873.”

By section 1 of the Supreme Court of Judicature Act, 1875, it is provided that this Statute and the Supreme Court of Judicature Act, 1875, may be cited together as “The Supreme Court of Judicature Acts, 1873 and 1875.”

SECTION 2.—*Commencement of Act.*

This Act, except any provision thereof which is declared to take effect on the passing of this Act, shall commence and come into operation on the second day of November, 1874.

By the Statute 37 and 38 Vict., cap. 83, “Supreme Court of Judicature (Commencement) Act, 1874,” section 1, this section is repealed. By section 2 of that Act, it is provided that the Supreme Court of Judicature Act, 1873, except any provisions thereof directed to take effect on the passing of that Act, shall commence and come into operation on the first day of November, 1875, and the said first day of November, 1875, shall be taken to be the time appointed for the commencement of the said Act.

The Supreme Court of Judicature (Commencement) Act was passed at the close of the Session of 1874, on account of the withdrawal of the Supreme Court of Judicature (1873) Amendment Bill. The competing claims of the Scottish Church Patronage Bill, the English Public Worship Bill, and the Endowed Schools Bill led to its withdrawal. The Supreme Court of Judicature (Commencement) Act, 1874, is not affected by the Supreme Court of Judicature Act, 1875; but by the 2nd section of the last-mentioned Act it is provided that that Act, except any provision of it which is declared to take effect before-

hand, shall commence and come into operation on the 1st day of November, 1875, the same date as that fixed by the Supreme Court of Judicature (Commencement) Act, 1874, for the coming into operation of the Supreme Court of Judicature Act, 1873.

The words in the present section, "except any provision thereof which is declared to take effect on the passing of this Act," refer to section 25 (1) and (7), but see section 10 of Amending Act; section 27 (empowering Her Majesty to make Orders in Council regulating Vacations); section 60 (enabling the Queen to establish District Registrars); and section 68 (as to making Rules of Court before the commencement of the Act by Order in Council).

PART I.

CONSTITUTION AND JUDGES OF SUPREME COURT.

SECTION 3.—*Union of existing Courts into one Supreme Court.*

From and after the time appointed for the commencement of this Act, the several Courts hereinafter mentioned (that is to say), the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature in England.

Section 33 of the Supreme Court of Judicature Act, 1875, and the second Schedule to that Act, repeal so much of this section as relates to the London Court of Bankruptcy. See also sections 16 and 34 *infra*. The substi-

tuted provisions will be found in section 9 of the Amending Act, by which it is declared that the Principal Act shall be construed as if the jurisdiction of the London Court of Bankruptcy had not been transferred by it to the High Court of Justice.*

This section is founded on the following recommendation of the Judicature Commission† :—

“We are of opinion that the defects which we have adverted to cannot be completely remedied by any mere transfer or blending of jurisdiction between the Courts as at present constituted; and that the first step towards meeting and surmounting the evils complained of will be the *consolidation* of all the Superior Courts of Law and Equity, together with the Courts of Probate, Divorce and Admiralty, into one Court to be called ‘Her Majesty’s Supreme Court,’ in which Court shall be vested all the jurisdiction which is now exercisable by each and all of the Courts so consolidated. This consolidation would at once put an end to all conflicts of jurisdiction. No suitor would be defeated because he commenced his suit in the wrong Court, and sending the suitor from equity to law and from law to equity to begin his suit over again, in order to obtain redress, will be no longer possible.”

“I propose,” said Lord Selborne, C., when introducing the Supreme Court of Judicature Bill, 1873, “to ask your lordships to unite in one Supreme Court of Judicature all the present Superior Courts of Common Law and Equity and also the Probate and Divorce Court, the Admiralty Court and the London or Central Court of Bankruptcy. I do not mean to elevate any of the inferior Courts so as to unite them to the superior Courts; but it is proposed to abolish two Common Law Jurisdictions, the Courts of Pleas of the Counties Palatine of Lancaster and Durham; they will be merged in the jurisdiction of the High Court.”

The only alteration in the scheme as stated by Lord Selborne is the retention, as already mentioned, of the London Court of Bankruptcy as a separate Court.

* The position assigned to the London Court of Bankruptcy by the Amending Act was the subject of comment in the House of Commons in 1875.

† First Report (1869), p. 9.

SECTION 4.—*Division of Supreme Court into a Court of Original and a Court of Appellate Jurisdiction.*

The said Supreme Court shall consist of two permanent Divisions, one of which, under the name of “Her Majesty’s High Court of Justice,” shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior Courts as is hereinafter mentioned, and the other of which, under the name of “Her Majesty’s Court of Appeal,” shall have and exercise appellate jurisdiction, with such original jurisdiction, as hereinafter mentioned, as may be incident to the determination of any appeal.

As to appeals from inferior Courts, see s. 45 *infra*.

This section, as framed in 1873, had a different meaning from that which attaches to it now. It was intended to be an exhaustive division of the supreme judicature of the kingdom, but at present it leaves untouched the jurisdiction of the Final Courts of Appeal, the “Court of Appeal” being only an *intermediate* Court of Appeal.

This section is, also, founded on a recommendation of the Judicature Commission:—“We propose that in the place of the Court of Exchequer Chamber and of the Court of Appeal in Chancery, both which Courts, as now constituted, would cease to exist, there should be established, *as a part of the Supreme Court*, a Court of Appeal.” This Court of Appeal was to be an *intermediate* Court of Appeal, and it is a noteworthy fact, which it is only fair to the present government to mention, that the Supreme Court of Judicature Act, 1875, while it departs from the scheme of Lord Selborne, which transferred to the new Court of Appeal the appellate jurisdiction of the House of Lords, and, to some extent, that of the Judicial Committee of the Privy Council also, legislates upon the lines laid down in

the Report of the Judicature Commission. The Court of Appeal mentioned in the present section is not a final but an *intermediate* Court of Appeal, representing the former Court of Appeal in Chancery and Court of Exchequer Chamber. As originally passed, the Court of Appeal mentioned in the present section was the *sole* Court of Appeal for England. It was not, however, while changing the meaning of the name "Court of Appeal," thought necessary to alter the name—the name "Court of Appeal" having now precisely the meaning which the Judicature Commission intended it should have.

SECTION 5.—*Constitution of High Court of Justice.*

Her Majesty's High Court of Justice shall be constituted as follows:—The first Judges thereof shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the several Vice-Chancellors of the High Court of Chancery, the Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, the several Puisne Justices of the Courts of Queen's Bench and Common Pleas respectively, the several Junior Barons of the Court of Exchequer, and the Judge of the High Court of Admiralty, except such, if any, of the aforesaid Judges as shall be appointed ordinary Judges of the Court of Appeal.

Subject to the provisions hereinafter contained, whenever the office of a Judge of the said High Court shall become vacant, a new Judge may be

appointed thereto by Her Majesty by Letters Patent. All persons to be hereafter appointed to fill the places of the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and their successors respectively, shall continue to be appointed to the same respective offices, with the same precedence, and by the same respective titles, and in the same manner respectively as heretofore. Every Judge who shall be appointed to fill the place of any other Judge of the said High Court of Justice shall be styled in his appointment, "Judge of Her Majesty's High Court of Justice," and shall be appointed in the same manner in which the Puisne Justice and Junier Barons of the Superior Courts of Common Law have been heretofore appointed : *Provided always, that if at the commencement of this Act the number of Puisne Justices and Junier Barons who shall become Judges of the said High Court shall exceed twelve in the whole, no new Judge of the said High Court shall be appointed in the place of any such Puisne Justice or Junier Baron who shall die or resign while such whole number shall exceed twelve, it being intended that the permanent number of Judges of the said High Court shall not exceed twenty-one.*

All the Judges of the said Court shall have in all respects, save as in this Act is otherwise expressly provided, equal power, authority, and jurisdiction, and shall be addressed in the manner which is now customary in addressing the Judges of the Superior Courts of Common Law.

The Lord Chief Justice of England for the time

being shall be President of the said High Court of Justice in the absence of the Lord Chancellor.

There are two curious *errata* in this section: the words in the proviso to the second paragraph "the permanent number of Judges of the said High Court," having been inserted by mistake for "the number of permanent Judges of the said High Court." This mistake was corrected by section 3 of the Amending Act, as originally framed.

In the first paragraph of the present section, again, there are twenty-two Judges enumerated, *including the Lord Chancellor*, while, in the second paragraph the intention of the Legislature is stated to be that the total number of Judges "shall not exceed twenty-one!" Section 3 of the Amending Act, as originally framed, set this right by stating, that in the construction of section 5 of the principal Act, the Lord Chancellor should be "deemed to be [a] permanent Judge of the High Court."

The 3rd section of the Amending Act was subsequently altered, in deference to the feeling of the House of Commons, into a simple repeal of the proviso to the second paragraph of the present section, with the addition of a statement to the effect that "the Lord Chancellor shall not be deemed to be a permanent Judge of the High Court, and the provisions of the said section relating to the appointment and style of the Judges of the said High Court shall not apply to the Lord Chancellor."*

It will be perceived that "the Judge of the High Court of Admiralty" is made a Judge of the High Court of Justice by the present section. The 8th section of the Amending Act, after pointing out that the Judge of the High Court of Admiralty is "inferior in position, as to salary and pension," to the other puisne common law Judges, places him on the same footing with them in these respects, on condition that he signify to the Lord

* It would have been neater to have included the repeal of the proviso in the second Schedule to the Amending Act, and the writer would have moved to leave it out here and to include it there, if there had been a day's interval between the Committee and the Report of the Bill.

Chancellor, in writing, before the commencement of the Act, his willingness to relinquish the "ecclesiastical and other offices" which he holds in addition to the office of Judge of Admiralty, and resign "all other offices of emolument," accordingly, before the same date.

SECTION 6.—*Constitution of Court of Appeal.*

9. *Her Majesty's Court of Appeal shall be constituted as follows :—There shall be five ex officio Judges thereof, and also so many Ordinary Judges (not exceeding nine at any one time) as Her Majesty shall from time to time appoint. The ex officio Judges shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of Exchequer. The first Ordinary Judges of the said Court shall be the existing Lords Justices of Appeal in Chancery, the existing salaried Judges of the Judicial Committee of Her Majesty's Privy Council, appointed under the "Judicial Committee Act, 1871," and such three other persons as Her Majesty may be pleased to appoint by Letters Patent : such appointment may be made either within one month before or at any time after the day appointed for the commencement of this Act, but if made before shall take effect at the commencement of this Act.*

Besides the said ex officio Judges and Ordinary Judges, it shall be lawful for Her Majesty (if she shall think fit), from time to time to appoint, under Her Royal Sign Manual, as Additional Judges of the Court of Appeal, any persons who, having held in England the office of a Judge of the Superior Courts of Westminster hereby united and consolidated, or of Her Majesty's Supreme Court hereby constituted, or in Scotland the office of Lord Justice General or Lord Justice Clerk, or in Ireland the office of Lord Chancellor or Lord Justice of Appeal, or in India the office of Chief Justice of the High Court of Judicature at Fort William in Bengal, or Madras, or Bombay, shall respectively signify in writing their willingness to serve as such Additional Judges in the Court of Appeal. No such Additional Judge shall be deemed to have undertaken the duty of sitting in the Court of Appeal when prevented from so doing by attendance in the House of Lords, or on the discharge of any other public duty, or by any other reasonable impediment.

The Ordinary and Additional Judges of the Court of Appeal shall be styled Lords Justices of Appeal. All the Judges of the said Court shall have, in all respects, save as in this Act is otherwise expressly mentioned, equal power, authority and jurisdiction.

Whenever the office of an Ordinary Judge of the Court of Appeal becomes vacant, a new Judge may be appointed thereto by Her Majesty by Letters Patent.

The Lord Chancellor for the time being shall be President of the Court of Appeal.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule to that Act. The substituted provisions will be found in section 4 of the Amending Act.

A severe controversy long raged round the important question whether there should be one Court of Appeal only, or two—an intermediate Court of Appeal and a final Court of Appeal. The question may now be considered to have been decided in favour of a double appeal. In 1873, Lord Cairns expressed himself as follows on this question:—

“It is extremely plausible to say that there shall be only one appeal, but *I doubt whether the principle is quite sound*. Great injustice may be done if the single appeal is insisted on; and it must not be forgotten that a third Court has great advantages over a first Appeal Court. The arguments to be submitted to it are more matured and better understood, and the judgments of the judges can be considered side by side, and can be corrected. I am not ignorant of the danger of multiplying appeals; but my objection is that you may go too far in the opposite direction.”*

SECTION 7.—*Vacancies by resignation of Judges and effect of vacancies generally.*

The office of any Judge of the said High Court of Justice, or of the said Court of Appeal, may be vacated by resignation in writing, under his hand, addressed to the Lord Chancellor, without any deed of surrender; and the office of any Judge of the said High Court shall be vacated by his being appointed a judge of the said Court of Appeal. The said Courts respectively shall be deemed to be duly constituted during and not-

* Hansard's Parliamentary Debates, New Series, vol. 214, p. 364.

withstanding any vacancy in the office of any Judge of either of such Courts.

SECTION 8.—*Qualifications of Judges. Not required to be Serjeants-at-Law.*

Any barrister of not less than ten years' standing shall be qualified to be appointed a Judge of the said High Court of Justice; and any person who if this Act had not passed would have been qualified by law to be appointed a Lord Justice of the Court of Appeal in Chancery, or has been a Judge of the High Court of Justice of not less than one year's standing, shall be qualified to be appointed an ordinary Judge of the said Court of Appeal: Provided, that no person appointed a Judge of either of the said Courts shall henceforth be required to take, or to have taken, the degree of Serjeant-at-Law.

By s. 1 of the 14 & 15 Vict., c. 83, the qualification of a Lord Justice is stated to be "the being or having been a barrister of fifteen years' standing."

A curious result of the Judges ceasing to take the degree of the coif is that they will continue, after their appointment, to be members of their respective Inns of Court, instead of becoming, as heretofore, members of Serjeants' Inn; and if they are not only members, but also benchers, of their respective Inns of Court, they will hear appeals, as Judges, from their own decisions as benchers.

SECTION 9.—*Tenure of office of Judges, and oaths of office. Judges not to sit in the House of Commons.*

All the Judges of the High Court of Justice, and of the Court of Appeal respectively, shall hold their offices for life, subject to a power of removal by Her

Majesty, on an Address presented to Her Majesty by both Houses of Parliament. No Judge of either of the said Courts shall be capable of being elected to or of sitting in the House of Commons. Every Judge of either of the said Courts (other than the Lord Chancellor) when he enters on the execution of his office, shall take, in the presence of the Lord Chancellor, the oath of allegiance, and judicial oath as defined by the Promissory Oaths Act, 1868. The oaths to be taken by the Lord Chancellor shall be the same as heretofore.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule to that Act. The substituted provisions will be found in the 5th section of the Supreme Court of Judicature Act, 1875. The repealed section of this Act is re-enacted, with the exception of the words “for life,” which are omitted and replaced by the words “during good behaviour.”

SECTION 10.—*Precedence of Judges.*

The ex officio Judges of the Court of Appeal shall rank in the Supreme Court in the order of their present respective official precedence. The other Judges (whether Ordinary or Additional) of the Court of Appeal shall rank in the Supreme Court, if Peers or Privy Counsellors, in the order of their respective precedence; and the rest of the Judges of the Court of Appeal shall rank according to the priority of their respective appointments to be Judges thereof.

The Judges of the High Court of Justice, who are not also Judges of the Court of Appeal, shall rank next after the Judges of the Court of Appeal, and among themselves (subject to the provisions hereinafter contained as to existing Judges), according to the priority of their respective appointments.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule to that Act. The substituted provisions will be found in the 6th section of the Amending Act, in which the provisions applicable only to the “Additional Judges” are omitted.

SECTION 11.—*A saving of rights and obligations of existing Judges.*

Every existing Judge, who is by this Act made a Judge of the High Court of Justice or an ordinary Judge of the Court of Appeal shall, as to tenure of office, rank, title, salary, pension,

patronage, and powers of appointment or dismissal, and all other privileges and disqualifications, remain in the same condition as if this Act had not passed; and, subject to the change effected in their jurisdiction and duties by or in pursuance of the provisions of this Act, each of the said existing Judges shall be capable of performing and liable to perform all duties which he would have been capable of performing or liable to perform in pursuance of any Act of Parliament, law, or custom if this Act had not passed. No Judge appointed before the passing of this Act shall be required to act under any Commission of Assize, Nisi Prius, Oyer and Terminer, or Gaol Delivery, unless he was so liable by usage or custom at the commencement of this Act.

Service as a Judge in the High Court of Justice, or in the Court of Appeal, shall, in the case of an existing Judge, for the purpose of determining the length of service entitling such Judge to a pension on his retirement, be deemed to be a continuation of his service in the Court of which he is a Judge at the time of the commencement of this Act.

This is one of the transition clauses of this Act.

The 8th section of the Amending Act, after referring to the 5th section of this Act, and reciting the first paragraph of this section, places the Judge of the High Court of Admiralty on the same footing "as to salary and pension" as "the other puisne Judges of the Superior Courts of Common Law," on condition that he resign "before the

commencement of this Act all other offices of emolument which he holds in addition to the office of Judge of the High Court of Admiralty." If he comply with this condition, his service is to be "reckoned in the same manner as if the High Court of Justice had been established at the time of his accepting the office of Judge of the High Court of Admiralty, and he had continued for such time to be a Judge of the High Court of Justice."

SECTION 12.—*Provisions for extraordinary duties of Judges of the former Courts.*

If, in any case not expressly provided for by this Act, a liability to any duty, or any authority or power, not incident to the administration of justice in any Court, whose jurisdiction is transferred by this Act to the High Court of Justice, shall have been imposed or conferred by any statute, law, or custom upon the Judges or any Judge of any such Courts, save as hereinafter mentioned, every Judge of the said High Court shall be capable of performing and exercising, and shall be liable to perform and empowered to exercise every such duty, authority, and power, in the same manner as if this Act had not passed, and as if he had been duly appointed the successor of a Judge liable to such duty, or possessing such authority or power, before the passing of this Act. Any such duty, authority, or power, imposed or conferred by any statute, law, or custom, in any such case as aforesaid, upon the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common

Pleas, or the Lord Chief Baron, shall continue to be performed and exercised by them respectively, and by their respective successors, in the same manner as if this Act had not passed.

This is one of the transition clauses of this Act.

SECTION 13.—*Salaries of future Judges.*

Subject to the provisions in this Act contained with respect to existing Judges, there shall be paid the following salaries, which shall in each case include any pension granted in respect of any public office previously filled by him, to which the Judge may be entitled :

To the Lord Chancellor, the sums hitherto payable to him ;

To the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, the same annual sums which the holders of those offices now respectively receive ;

To each of the Ordinary Judges of the Court of Appeal ; and,

To each of the other Judges of the High Court of Justice, the sum of five thousand pounds a-year.

No salary shall be payable to any Additional Judge of the Court of Appeal appointed under this Act ; but nothing in this Act shall in any way prejudice the right of any such Additional Judge to any pension to which he may be by law entitled.

Section 33 of the Supreme Court of Judicature Act,

1875, and the second Schedule to that Act, repeal so much of this section as relates to Additional Judges of the Court of Appeal. The salary of the Lord Chancellor is fixed at £10,000 ; of the Chief Justice of England at £8,000 ; of the Master of the Rolls at £6,000 ; of the Chief Justice of the Common Pleas at £7,000 ; and of the Chief Baron at £7,000. £5,000 is the salary of a puisne Judge.

See, as to Judges' salaries, 14 and 15 Vict., c. 41 (amending 2 and 3 Will. IV., c. 116), and 14 and 15 Vict., c. 83.

SECTION 14.—*Retiring pensions of future Judges of High Court of Justice, and ordinary Judges of Court of Appeal.*

Her Majesty may, by Letters Patent, grant to any Judge of the High Court of Justice, or to any Ordinary Judge of the Court of Appeal who has served for fifteen years as a Judge in such Courts, or either of them, or who is disabled by permanent infirmity from the performance of the duties of his office, a pension, by way of annuity, to be continued during his life :

In the case of the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, the same amount of pension which at present might under the same circumstances be granted to the holder of the same office :

In the case of any ordinary Judge of the Court of Appeal or any other Judge of the High Court of Justice, the same amount of pension which at present might under the

same circumstances be granted to a puisne Justice of the Court of Queen's Bench.

The pension payable to the Chief Justice of England is £4,000 ; to the Master of the Rolls £3,750 ; to the Chief Justice of the Common Pleas, £3,750 ; to the Chief Baron, £3,750 ; and to a puisne Judge, £3,500. See 39 Geo. III., c. 110, s. 7 ; 53 Geo. III., c. 153, s. 1 ; and 6 Geo. IV., cc. 82, 83, 84.

SECTION 15.—*Salaries and Pensions how to be paid.*

Subject to the provisions in this Act contained with respect to existing Judges, the salaries, allowances, and pensions payable to the Judges of the High Court of Justice, and the Ordinary Judges of the Court of Appeal respectively, shall be charged on and paid out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland, or the growing produce thereof ; such salaries and pensions shall grow due from day to day, but shall be payable to the persons entitled thereto, or to their executors or administrators, on the usual quarterly days of payment, or at such other periods in every year as the Treasury may from time to time determine.

This section is copied from the Stat. 39 Geo. III., c. 100, s. 7.

PART II.

JURISDICTION AND LAW.

SECTION 16.—*Jurisdiction of High Court of Justice.*

The High Court of Justice shall be a Superior

Court of Record, and, subject as in this Act mentioned, there shall be transferred to and vested in the said High Court of Justice the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any of the Courts following: (that is to say),

- (1.) The High Court of Chancery, as a Common Law Court as well as a Court of Equity, including the jurisdiction of the Master of the Rolls, as a Judge or Master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a Common Law Court;
- (2.) The Court of Queen's Bench;
- (3.) The Court of Common Pleas at Westminster;
- (4.) The Court of Exchequer, as a Court of Revenue, as well as a Common Law Court;
- (5.) The High Court of Admiralty;
- (6.) The Court of Probate;
- (7.) The Court for Divorce and Matrimonial Causes;
- (8.) *The London Court of Bankruptcy.*
- (9.) The Court of Common Pleas at Lancaster;
- (10.) The Court of Pleas at Durham;
- (11.) The Courts created by Commission of Assize, of Oyer and Terminer, and of Gaol Delivery, or any of such Commissions:

The jurisdiction by this Act transferred to the High Court of Justice shall include (subject to

the exceptions hereinafter contained) the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the Judges of the said Courts respectively, sitting in Court or Chambers, or elsewhere, when acting as Judges or a Judge, in pursuance of any statute, law, or custom, and all powers given to any such Court, or to any such Judges or Judge, by any statute; and also all ministerial powers, duties, and authorities, incident to any and to every part of the jurisdictions so transferred.

“Subject to the exceptions hereinafter contained.” See ss. 49 and 50, *infra*.

Section 33 of the Supreme Court of Judicature Act, 1875, and the Schedule to that Act, repeal so much of this section as relates to the London Court of Bankruptcy. See also section 3, *supra*, and section 34, *infra*, of this Act. The substituted provisions will be found in section 9 of the Amending Act.

SECTION 17.—*Jurisdiction not transferred to High Court.*

There shall not be transferred to or vested in the said High Court of Justice, by virtue of this Act,—

- (1.) Any appellate jurisdiction of the Court of Appeal in Chancery, or of the same Court sitting as a Court of Appeal in Bankruptcy:
- (2.) Any jurisdiction of the Court of Appeal in Chancery of the County Palatine of Lancaster:
- (3.) Any jurisdiction usually vested in the Lord Chancellor, *or in the Lords Justices of Appeal in*

Chancery, or either of them, in relation to the custody of the person and estates of idiots, lunatics, and persons of unsound mind :

- (4.) Any jurisdiction vested in the Lord Chancellor in relation to grants of Letters Patent, or the issue of commissions or other writings, to be passed under the Great Seal of the United Kingdom :
- (5.) Any jurisdiction exercised by the Lord Chancellor in right of or on behalf of Her Majesty as visitor of any College, or of any charitable or other foundation :
- (6.) Any jurisdiction of the Master of the Rolls in relation to records in London or elsewhere in England.

See, as to subsections 1 and 2, the next section of this Act, subsections 1 and 2.

Although by sections 9 and 33, and the second Schedule of the Amending Act of 1875, the London Court of Bankruptcy is severed from the High Court of Justice, sub-section 2 of section 9 of that Act expressly provides that "appeals from the London Court of Bankruptcy shall lie to the Court of Appeal, as provided by the Principal Act"—*i.e.*, by the present section of it. (See section 18 of the Amending Act as to Rules and Orders of Court in force "in relation to appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in Chancery in Bankruptcy matters.")

As to subsection (3), see s. 7 of the Amending Act.

SECTION 18.—*Jurisdiction transferred to Court of Appeal.*

The Court of Appeal established by this Act shall be a Superior Court of Record, and there

shall be transferred to and vested in such Court all jurisdiction and powers of the Courts following : (that is to say),

- (1.) All jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery, in the exercise of his and its appellate jurisdiction, and of the same Court as a Court of Appeal in Bankruptcy :
- (2.) All jurisdiction and powers of the Court of Appeal in Chancery of the county palatine of Lancaster, and all jurisdiction and powers of the Chancellor of the duchy and county palatine of Lancaster when sitting alone or apart from the Lords Justices of Appeal in Chancery as a Judge of rehearing or appeal from decrees or orders of the Court of Chancery of the county palatine of Lancaster :
- (3.) All jurisdiction and powers of the Court of the Lord Warden of the Stannaries assisted by his assessors, including all jurisdiction and powers of the said Lord Warden when sitting in his capacity of Judge :
- (4.) All jurisdiction and powers of the Court of Exchequer Chamber :
- (5.) All jurisdiction vested in or capable of being exercised by Her Majesty in Council, or the Judicial Committee of Her Majesty's Privy Council, upon appeal from any judgment or order of the High Court of

Admiralty, or from any order in lunacy made by the Lord Chancellor, or any other person having jurisdiction in lunacy.

The 9th section of the Amending Act severs the London Court of Bankruptcy from the High Court of Justice; but it at the same time provides that "the appeal from the London Court of Bankruptcy shall lie to the Court of Appeal in accordance with the Principal Act."

(3). Error did not lie to the Superior Courts from the Vice-Warden; but by 18 and 19 Vict., c. 32, s. 26, from all decrees and orders of the Vice-Warden on the Equity side of this Court, and from all judgments of the Vice-Warden on the Common Law side thereof, there was an appeal to the Lord Warden (assisted by two or more assessors, members of the Judicial Committee of the Privy Council, or Judges of the High Court of Chancery, or Courts of Common Law at Westminster), and from the Lord Warden, a final appeal to the Judicial Committee.

As to subsection (5), see s. 2 of the Amending Act.

SECTION 19.—*Appeals from High Court.*

The said Court of Appeal shall have jurisdiction and power to hear and determine Appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any Judges or Judge thereof, subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and conditions on which such Appeals shall be allowed, as may be made pursuant to this Act.

For all the purposes of and incidental to the hearing and determination of any Appeal within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order made on

any such Appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court of Justice.

“Save as hereinafter mentioned,” see ss. 47, 48, 49, and 50, *infra*.

The Rules of Court relating to Appeals will be found in Order 58 of the first Schedule to the Supreme Court of Judicature Act, 1875.

SECTION 20.—*No appeal from High Court or Court of Appeal to House of Lords or Judicial Committee.*

No error or appeal shall be brought from any judgment or order of the High Court of Justice, or of the Court of Appeal, nor from any judgment or order, subsequent to the commencement of this Act, of the Court of Chancery of the county palatine of Lancaster, to the House of Lords or to the Judicial Committee of Her Majesty's Privy Council; but nothing in this Act shall prejudice any right existing at the commencement of this Act to prosecute any pending writ of error or appeal, or to bring error or appeal to the House of Lords or to Her Majesty in Council, or to the Judicial Committee of the Privy Council, from any prior judgment or order of any Court whose jurisdiction is hereby transferred to the High Court of Justice or to the Court of Appeal.

The operation of this section is suspended until the first day of November, 1876, by the second section of the Supreme Court of Judicature Act, 1875, and the section itself will probably be repealed in the Session of 1876, when the constitution of the Final Court of Appeal is to be permanently and definitively settled.

It has been so frequently stated that this clause passed unchallenged in the House of Commons in 1873 that it may not be out of place here to state that a division, in which the writer acted as “teller,” took place upon the clause in the Committee on the Bill in the House of

Commons on the 3rd of July, 1873. The numbers were, for the clause 154; against, 93.*

In the minority the names of 14 members of the present Government will be found recorded, and also the name of the present Chairman of Committees. It is only fair to the present Government that this fact should be thus prominently noticed. In the face of the remarkable movement in favour of preserving the Appellate Jurisdiction of the House of Lords, which developed itself so rapidly and simultaneously in the legal profession and in both Houses of Parliament, it would have been a mere waste of time for the Government to have attempted to force this clause on the Legislature. The most natural course would have been to repeal it. By way of conciliating, however, the authors of the clause, the Government proposed that it should be simply suspended for a year, and this was accepted on all sides as a reasonable compromise.

SECTION 21.—*Power to transfer jurisdiction of Judicial Committee by Order in Council.*

It shall be lawful for Her Majesty, if she shall think fit, at any time hereafter, by Order in Council to direct that all Appeals and Petitions whatsoever to Her Majesty in Council which according to the laws now in force ought to be heard by or before the Judicial Committee of Her Majesty's Privy Council, shall from and after a time to be fixed by such Order, be referred for hearing to and be heard by Her Majesty's Court of Appeal; and from and after the time fixed by such Order, all such Appeals and Petitions shall be referred for hearing to and be heard by the said Court of Appeal accordingly, and shall not be heard by the said Judicial Committee; and for all the purposes of and incidental to the hearing of such Appeals or Petitions, and the reports to be made to Her Majesty thereon, and all orders thereon to be afterwards made by Her Majesty in Council, and also for all purposes of and incidental to the enforcement of any such Orders as may be made by the said Court of Appeal or by Her Majesty, pursuant to this section (but not for any other purpose), all the power, authority, and jurisdiction now by law vested in the said Judicial Committee shall be transferred to and vested in the said Court of Appeal.

The Court of Appeal, when hearing any appeals in Ecclesiastical Causes which may be referred to it in manner aforesaid, shall be constituted of such

* Hansard's Parliamentary Debates, New Series, vol. 216, p. 1,756.

and so many of the Judges thereof, and shall be assisted by such assessors being Archbishops or Bishops of the Church of England, as Her Majesty, by any General Rules made with the advice of the Judges of the said Court, or any five of them (of whom the Lord Chancellor shall be one), and of the Archbishops and Bishops who are members of Her Majesty's Privy Council, or any two of them (and which General Rules shall be made by Order in Council), may think fit to direct: Provided that such rules shall be laid before each House of Parliament within forty days of the making of the same, if Parliament be then sitting, or if not, then within forty days of the commencement of the then next ensuing session; and if an address is presented to Her Majesty by either House of Parliament within the next subsequent forty days on which the said House shall have sat, praying that any such rules may be annulled, Her Majesty may thereupon by Order in Council annul the same; and the rules so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same.

The operation of this section is, like that of the last, suspended until the first day of November, 1876, by the second section of the Supreme Court of Judicature Act, 1875.

SECTION 22.—*Transfer of pending business.*

From and after the commencement of this Act the several jurisdictions which by this Act are transferred to and vested in the said High Court of Justice and the said Court of Appeal respectively, shall cease to be exercised, except by the said High Court of Justice and the said Court of Appeal respectively, as provided by this Act, and no further or other appointment of any Judge to any Court whose jurisdiction is so transferred shall be made except as provided by this Act: Provided, that in all causes, matters and proceedings whatsoever which shall have been fully heard, and in which judgment shall not have been given, or having been given shall not have been signed, drawn up, passed, entered, or otherwise per-

fectcd at the time appointed for the commencement of this Act, such judgment, decree, rule, or order may be given or made, signed, drawn up, passed, entered, or perfected respectively, after the commencement of this Act, in the name of the same Court, and by the same judge and officers, and generally in the same manner, in all respects, as if this Act had not passed; and the same shall take effect, to all intents and purposes, as if the same had been duly perfected before the commencement of this Act; and every judgment, decree, rule, or order of any Court whose jurisdiction is hereby transferred to the said High Court of Justice or the said Court of Appeal, which shall have been duly perfected at any time before the commencement of this Act, may be executed and enforced, and, if necessary, amended or discharged, by the said High Court of Justice and the said Court of Appeal respectively, in the same manner as if it had been a judgment, decree, rule, or order of the said High Court or of the said Court of Appeal; and all causes, matters, and proceedings whatsoever, whether Civil or Criminal, which shall be pending in any of the Courts whose jurisdiction is so transferred as aforesaid at the commencement of this Act, shall be continued and concluded, as follows (that is to say), in the case of proceedings in Error on Appeal, or of proceedings before the Court of Appeal in Chancery in and before Her Majesty's Court of Appeal; and, as to all other proceedings, in and

before Her Majesty's High Court of Justice. The said Courts respectively shall have the same jurisdiction in relation to all such causes, matters, and proceedings as if the same had been commenced in the said High Court of Justice, and continued therein (or in the said Court of Appeal, as the case may be) down to the point at which the transfer takes place ; and, so far as relates to the form and manner of procedure such causes, matters, and proceedings, or any of them, may be continued and concluded, in and before the said Courts respectively, either in the same or the like manner as they would have been continued and concluded in the respective Courts from which they shall have been transferred as aforesaid, or according to the ordinary course of the said High Court of Justice and the said Court of Appeal respectively (so far as the same may be applicable thereto), as the said Courts respectively may think fit to direct.

This is one of the transition clauses of this Act.

SECTION 23.—*Rules as to exercise of jurisdiction.*

The jurisdiction by this Act transferred to the said High Court of Justice and the said Court of Appeal respectively shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such Rules and Orders of Court as may be made pursuant to this Act ; and where no special provision is contained in this Act or any such Rules or Orders of Court

with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred, or by any of such Courts.

This is one of the transition clauses of this Act.

SECTION 24.—*Law and Equity to be concurrently administered.*

In every civil cause or matter commenced in the High Court of Justice law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively, according to the rules following :—

- (1.) If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a Court of Equity, the said Courts respectively, and every Judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act.

- (2.) If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every Judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act.
- (3.) The said Courts respectively, and every Judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge

thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any Rule of Court or any Order of the Court as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant.

- (4.) The said Courts respectively, and every Judge thereof, shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognised and taken notice of the same in any suit or proceeding² duly insti-

tuted therein before the passing of this Act.

- (5.) No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it, if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any Judgment, Decree, Rule, or Order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes

of justice ; and the Court shall thereupon make such Order as shall be just.

- (6.) Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this Act, the said Courts respectively, and every Judge thereof, shall recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the Common Law or by any custom, or created by any Statute, in the same manner as the same would have been recognised and given effect to if this Act had not passed by any of the Courts whose jurisdiction is hereby transferred to the said High Court of Justice.
- (7.) The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter ; so that, as far as possible, ALL MATTERS SO IN CONTROVERSY

BETWEEN THE SAID PARTIES RESPECTIVELY
MAY BE COMPLETELY AND FINALLY DETER-
MINED, AND ALL MULTIPLICITY OF LEGAL
PROCEEDINGS CONCERNING ANY OF SUCH
MATTERS AVOIDED.

If the closing words of this section be verified by experience, this Act will prove a second Magna Charta to the suitor. Hitherto it has been the boast of the Court of Chancery that it alone of the Superior Courts is competent "completely and finally to determine *all* matters in controversy between the parties."

Lord Selborne, C., when introducing the present measure, gave this section a very prominent place in his sketch of its provisions. "I hope the measure which I shall lay on the table will contain what your lordships will consider sufficiently clear and precise directions as to the general way in which the legal and equitable jurisdiction" (of the Supreme Court) "is to be exercised." He then proceeded to sum up the contents of the present section as follows:—"Those directions are given under seven heads: first, the Court in all its branches will give effect to the equitable rights and remedies of plaintiffs: secondly, it will do the same with respect to equitable defences by defendants; thirdly, it will give effect to counter claims of defendants; fourthly, it will take notice of all equitable rights and liabilities of any persons appearing incidentally in the course of any proceedings; fifthly, it will stay proceedings, when necessary, by the authority of the Judges before whom an action is pending, and not by injunctions obtained from other Judges; sixthly, it will give effect, subject to all equities, to legal rights and remedies; and, lastly, it will deal, as far as possible, with all questions in controversy in one and the same suit, so as to do complete justice between the parties, and prevent a multiplicity of proceedings."*

Subsection (1) introduces an entirely new principle into

* Hansard's Parliamentary Debates, New Series, vol. 214, pp. 338, 339.

actions in the Queen's Bench, Common Pleas and Exchequer. Taken literally, indeed, the words would seem to imply that suits in Chancery would be properly cognisable henceforth in these Courts, or rather Divisions of the Supreme Court. A glance, however, at Section 34, *infra*, will dispel this illusion. Subsection (1) taken in connection with Section 34, can only mean that if, in the course of an action in the Common Law Divisions of the High Court, *relative to matters within their exclusive jurisdiction*, any equitable claim is advanced by the plaintiff, the Common Law Divisions shall afford the same relief with regard to that particular claim, as the Court of Chancery would have afforded "in a suit for a like purpose."

Subsection (2) of this section extends the principle already introduced by the Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125, s. 83, on the recommendation of the Royal Commission on Procedure at Common Law.* The Courts of Law, however, unfortunately held that a plea was inadmissible as an equitable plea at law, unless it was such as would have been a *complete answer* in Equity to the plaintiff's claim, and have justified a Court of Equity in granting a perpetual injunction, absolutely and without conditions.† A more liberal view of an "equitable plea" was, however, taken in the recent case of *Allen v. Walker* L. R. 5 Ex. 187, 191.

Subsection (3). This subsection gives effect to legal and equitable *counter-claims* of the defendant. It also introduces an important feature in the new system of procedure—the power of bringing third parties into the action after it has been commenced, and making them co-defendants. Copious instructions as to the method of procedure in such a case will be found in the first Schedule to the Supreme Court of Judicature Act, 1875, Order XVI. ("Parties").‡

Subsection (4) requires the Judges of the various Divisions of the High Court to take *judicial notice* of equitable

* As to this enactment, see the notes in the 13th Edition of Roscoe's *Nisi Prius*, pp. 328–334, and the cases there cited.

† *Mines Royal Co. v. Magnay*, 10 Ex., 489; *Hyde v. Graham*, 1 H & C., 598. *Wood v. Copper Mines Co.*, 17 C. B., 561; *Wake v. Hamp*, 6 H. & N., 770.

‡ See more especially Rules 17, 18, 19 & 20.

interests and liabilities, in the same manner as the Court of Chancery would have done, *irrespective of any claim made by the plaintiff or defendant.*

Subsection (5). "No cause or proceeding at any time pending in the High Court of Justice, or in the High Court of Appeal, shall be restrained by prohibition or injunction." Lord Coke in a case in 3 Bulstr. 120, *Warner v. Suckerman*, lays it down as law that the Court of Queen's Bench may prohibit, not only all inferior Courts, but also the other Superior Courts; but this doctrine has since been very much controverted, and it has been expressly decided,* that a prohibition will not lie to the Court of Chancery. Prohibition would, however, until the present enactment, have lain to the Court of Admiralty. It will now no longer lie. It will, however, continue to lie to the Ecclesiastical Courts, which are entirely *dehors* the scope of the Supreme Court of Judicature Acts, 1873 and 1875, and will also continue to lie to every inferior Court in the Kingdom. †

A writ of injunction by which proceedings at law are restrained is not in the nature of a prohibition. In issuing injunctions Courts of Equity have claimed no supremacy over the ordinary tribunals. An injunction is addressed *in personam* and is not directed to the Court. A defendant at law has often some equitable defence which a court of law cannot take cognizance of, either from want of jurisdiction or the infirmity of legal process. As it would be against conscience and good faith that the plaintiff at law should use the advantage of which he is thus possessed at law, a Court of Equity restrained by injunction an action at law where the right sought to be enforced was subservient to an equitable claim that the defendant at law could not set up there. The Court interfered on the principle of preventing a legal right from being enforced in an inequitable manner, and of ensuring that the real question and the whole matter in dispute between the parties might be determined. ‡ Injunctions to stay proceedings at law might be perpetual

* Comyn's Digest, tit. Prohibition (A).

† On the subject of Prohibitions, see Mr. Morgan Lloyd's *Treatise on the Law of Prohibition*, 1849.

‡ See Kerr on Injunctions in Equity, p. 13, 14

or temporary, total or partial, qualified or conditional, and they might be granted at any stage of the proceedings. Thus an injunction was sometimes granted to stay trial; sometimes after verdict to stay judgment; sometimes after judgment to stay execution; sometimes after execution to stay the money in the hands of the sheriff, or the delivery of possession. There was almost an infinite variety of occasions on which injunctions might issue to stay legal proceedings. In general it may be stated that an injunction would issue in all cases where, through accident, fraud, mistake, misrepresentation, inequality of footing between the parties, undue influence, complicated accounts, the existence of an equitable set off, liability to penalties and forfeitures or equitable assignments, it would have been against conscience to proceed in a Court of Common Law.*

The powers given to Courts of Common Law by the Common Law Procedure Act, 1854, 17 and 18 Vict., c. 125, s. 83, to entertain defences by plea upon equitable grounds, did not interfere with the jurisdiction of the Court of Chancery to restrain by injunction actions at law. The powers given by that Act were permissive only, and did not deprive the defendant at law of the right he had before the passing of that Act of going to a Court of Equity and taking the benefit of a defence which he could not avail himself of at Common Law. Although the defendant might have an equitable defence at law, he was not bound to plead it.†

By subsection (5) of this section the clumsy battery from which Courts of Equity were wont to keep up a raking fire upon plaintiffs at Common Law is dismantled, and its *débris* are carted away. "No cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by injunction; but *every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been*

* See Story's Commentaries on Equity Jurisprudence, §878-889.

† *Gompertz v. Pooley*, 4 Drew. 448; *Walker v. Mecklethwaite*, 1 Dr. & Sm., 54; *Davies v. Stainbank*, 6 D. M. and G., 696; *Kingsford v. Swinford*, 28 L. J. (Ch.), 413.

obtained if this Act had not passed, either unconditionally or on any terms or conditions, *may be relied on by way of defence* thereto." The editors of the 13th edition (1875) of Roscoe's "*Nisi Prius*," say with truth, in a foot note,* that "the Supreme Court of Judicature Act, 1873, section 24, much extends the power to set up equitable defences." Subsection (5), however, contains at the end an important proviso, enabling any person to apply by motion, in a summary way, for a stay of proceedings, and empowering the new Courts to direct it.

As to the principles upon which one branch of the Court will stay its proceedings, on the ground of proceedings commenced in another branch of the Court, reference may be made to *Martin v. Powning* (L. R., 4 Ch., 356), where the Court of Chancery refused (even before the recent Bankruptcy Act, 32 & 33 Vict., c. 71, s. 72) to interfere with the administration of a deed registered under the Act of 1861; also to *Morley v. White* (L. R., 8 Ch., 214), where a deceased person's estate, which was being administered in Chancery, having also fallen into the hands of a trustee in bankruptcy, the deceased person having been a partner, and having both joint and separate liabilities, it was held that proceedings must be taken in bankruptcy before the administration in Chancery could go on; and Lord Justice James said (p. 218): "It is true that there may be important questions to be determined before it can be ascertained how the distribution is to be made; but the Court of Bankruptcy is armed for that purpose with every power of a Court of Law and a Court of Equity, and there is not a single question stated to us, as an important and difficult question arising in this matter, which cannot be litigated and determined by that Court of Bankruptcy which the legislature has thought to be the proper tribunal for the determination of it; and those questions, if decided in Bankruptcy, would come on appeal before the same Court as if they had been determined in Chancery, that is, before the same judges sitting under one name instead of under another. Under these circumstances, I am of opinion that

the proper forum to determine every one of these questions is the Court of Bankruptcy."

If an interpleader suit (the object of which is to prevent the holder of money claimed by two persons from being vexed by two suits) is instituted in one branch of the Court, another branch will stay proceedings in respect of the same matter. *Prudential Assurance Company v. Thomas* (L. R., 3 Ch., 75) is a good example of an interpleader suit.*

Subsection (6) binds the judges to take judicial notice of legal, customary, and statutory rights, claims and liabilities, but only "subject to the aforesaid provisions for giving effect to equitable rights and other matters in equity." The full meaning of the subordinate position in which the Common Law is placed by the section can only be apprehended by referring to subsection (11) of section 25—"The Rules of Equity shall prevail." This, no doubt, is the dominating idea, not merely of this section, but of the whole Act.†

The student who is desirous of obtaining a comprehensive view of the effect of this section and the next upon the systems of legal and equitable jurisprudence will do well to procure "Equity under the Judicature Act," by Mr. Challoner W. Chute,‡ Lecturer to the Incorporated Law Society.

SECTION 25.—*Rules of Law upon certain points.*

And whereas it is expedient to take occasion of the union of the several Courts whose jurisdiction is hereby transferred to the said High Court of Justice to amend and declare the Law to be hereafter administered in England as to the matters

* Chute on Equity under the Judicature Act, pp. 160, 161.

† The marginal note to this section runs, "Law and Equity to be concurrently administered." To fill out its full meaning, however, it is necessary to add, "Provided always, that Law follows Equity, whenever they don't concur."

‡ London, Butterworths, 7, Fleet Street, 1874.

next hereinafter mentioned: Be it enacted as follows :—

Administration of Assets of Insolvent Estates.

- (1.) *In the administration by the Court of the assets of any person who may die after the passing of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future or contingent liabilities, respectively, as may be in force for the time being under the law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person may come in under the decree or order for the administration of such estate and make such claims against the same as they may respectively be entitled to by virtue of this Act.*

Statutes of Limitation inapplicable to Express Trusts.

- (2.) No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations.

Equitable Wastes.

- (3.) An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

Merger.

- (4.) There shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

Suits for Possession of Land by Mortgagors.

- (5.) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipts of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

Assignment of Debts and Choses in Action.

- (6.) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of

any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor : Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.

Stipulations not of the Essence of Contracts.

- (7.) Stipulations in contracts, as to time or otherwise, which would not before the *passing* of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity.

Injunctions and Receivers.

- (8.) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such Order should be made ; and any such Order may be made either unconditionally or upon such terms and conditions as the Court shall think just ; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under

any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable.

Damages by Collisions at Sea.

- (9.) In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail.

Infants.

- (10.) In questions relating to the custody and education of infants the Rules of Equity shall prevail.

Cases of conflict not enumerated.

- (11.) Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of the Common Law with reference to the same matter, THE RULES OF EQUITY SHALL PREVAIL.

Subsection (1) of this section was repealed in Committee on the Amending Act, on the motion of Mr. Jackson, and the following subsection was substituted for it:—"In the

administration by the Court of the assets of any person who may die after the [commencement] of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, [and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities, and the costs of winding up,] the same rules shall prevail and be observed, as to the respective rights of secured and unsecured creditors, and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, under the law of Bankruptcy, with respect to persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, may come in under the decree or order for the administration of such estate, [or under the winding up of such company,] and make such claims against the same as they may respectively be entitled to by virtue of this Act."

It will be seen that the effect of this Amendment is to destroy the rule in *Kellock's Case*,* as laid down by the Lords Justices.† That rule is as follows:—"When a company is being wound up under the Companies Act, 1862, a creditor holding security is entitled to prove for the whole amount that is due to him, and not merely, as in bankruptcy, for the balance remaining due after realising or valuing his security." Henceforth the rules in Bankruptcy "as to the respective rights of secured and unsecured creditors, and other debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively" will be made applicable "in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient," just as in this subsection, as originally passed in 1873, these rules were made applicable, "in the administration by the Court of the assets of any person, whose estate may prove to be insufficient."

* 3 L. R. (Ch. App.) 769. June, 1868.

† Lord Hatherley and Sir C. J. Selwyn.

The words added to the section by Mr. Jackson are enclosed in brackets.

The law upon the subject-matter of this subsection will be found in the Bankruptcy Act, 1869 (32 & 33 Vict., c. 71). See also Lee on Bankruptcy; Roche and Hazlitt on Bankruptcy; and Robson on Bankruptcy,

Lord Selborne, C., thus referred to the first subsection of this section in his opening remarks when introducing the present measure:—

“The first alteration is a rather important one. It is proposed that in the administration of insolvent estates by the Court after the death of the debtor, substantially the rules applicable to bankruptcy shall be adopted. There seems to be no good reason why the estate of an insolvent debtor should be administered in one way while he is living, and in another way when he is dead.”*

The rules of priority in the payment of debts by an executor or administrator are so strict, that if he pay those of a lower degree first, he must, on a deficiency of assets, answer those of a higher degree out of his own estate.†

These rules of priority may be stated as follows:—

The executor or administrator must pay—

1. Debts due to the Crown by record or speciality.
2. Debts to which particular statutes give priority, as in the case of an overseer of the poor, money due to the parish by him‡; in the case of any person formally and duly appointed an officer of a friendly society, money due by him to the society in virtue of his office§; in the case of the army, regimental debts||; in the case of a treasurer or collector to paving commissioners under the Metropolis Act, money collected by him and due to the Commissioners.¶
3. Debts of record, including—
 - (1.) Judgments of Courts of Record.
 - (2.) Decrees of Courts of Equity.
 - (3.) Orders in Bankruptcy, and

* Hansard's Parliamentary Debates, New Series, vol. 214, page 340.

† 2 Black Comm. 511.

‡ 17 Geo. II., c. 38, s. 3.

§ 18 & 19 Vict., c. 63, s. 23.

|| 26 & 27 Vict., c. 57.

¶ 57 George III., c. 22, s. 51 (Local Act).

(4.) Recognisances and statutes merchant and staple.*

4. Debts (1) by speciality, as on bonds, covenants, and other instruments under seal, and (2) by simple contract.†

It is beyond the power of a testator to disappoint the rules of law as to the precedence of debts, by directing his executors to make an equal distribution of the assets among his creditors.‡ But if the assets in the hands of an executor are equitable, *i.e.*, assets such as can only be reached with the help of a Court of Equity, and cannot be brought forward in evidence on issue joined on an executor's plea of "*plene administravit*," the assets must be applied in satisfaction of the claims of all the creditors *pari passu*, without any regard to the priority in rank of one debt over another. The principle of this distinction is that in natural justice and conscience, and in the contemplation of a Court of Equity, all debts are equal, and the debtor is equally bound to satisfy them all. "Equality," in short, is, in the view of the Court of Chancery, "Equity."§

Under the law of Bankruptcy now in force,—“The Bankruptcy Act, 1869,”||—the rule of equity that all debts shall be paid *pari passu* is adopted with two exceptions. (1) “All parochial or other local rates due from the bankrupt at the date of the order of adjudication, and having become due and payable within twelve months next before such time; all assessed taxes, land-tax, and property or income-tax, assessed or due up to the 5th day of April next before the date of the order of adjudication, and not exceeding in the whole one year's assessment; (2) all wages or salary of any clerk or servant in the employment of the bankrupt at the date of the order of adjudication, not exceeding four months' wages or salary, and not exceeding £50; all wages of any labourer or workman in the employment of the bankrupt at the date of the order of adjudication, and not exceeding two months' wages.” These debts are to be paid in priority to all other debts. Between themselves such

* 2 Stephen's Black., 202, 203, and William's Exors., part 3, b. 2, c. 2.

† See 32 and 33 Vict., c. 46.

‡ *Turner v. Cox*, 8 Mad., P. C., 288.

§ *Plunkett v. Penson*, 2 Atk., 294. Williams on Executors, part 4, bk. 1, ch. 1.

|| 32 and 33 Vict., c. 71.

debts rank equally, and are to be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they abate in equal proportions between themselves.*

"The respective rights of secured and unsecured creditors." A "secured creditor" is defined by the Bankruptcy Act, 1869, to mean "any creditor holding any mortgage, charge, or lien on the bankrupt's estate, or any part thereof, as security for a debt due to him."† An unsecured creditor is, of course, any creditor not holding such security. Under the earlier bankrupt laws, no proof whatever was allowed to be made by a creditor who held a security for his debt on the bankrupt's estate.‡ But this was altered, first as to persons holding a legal mortgage, and afterwards as to all other incumbrances, and at the time of the passing of the Bankruptcy Act, 1869,§ any creditor having a mortgage, charge, or lien on any part of the bankrupt's property, might either rest on his security and compel the assignees to redeem him, or he might apply to have his security realized under the direction of the Court, with leave to prove for any deficiency,|| or if such creditor had power at law to sell the property composed in his security he might realize it by sale without applying to the Court, and then prove for the deficiency.¶ But if the creditor proved his whole debt, he, as a general rule, forfeited the benefit of his security.**

The rights of creditors having a mortgage, charge, or lien on any part of the bankrupt's property are not materially altered by the Bankruptcy Act, 1869. Such creditors may still either rest on their securities and compel the trustee to redeem

* 32 and 33 Vict., c. 71, s. 32.

† 32 and 33 Vict., c. 71, s. 16, par. 5.

‡ Per Sir. S. Rose. *Ex parte McTurk*, 3 M. & A., 4.

§ Lord Loughborough's Order, 8th March, 1792; G. O, 1852, R. 56 *et seq.*

|| G. O. 1852, R. 55, *et seq.*

¶ *Ex parte Geller*, 2 Mad. 266; *Ex parte Rolfe*, 3 M. & A., 311; *Ex parte Johnson*, 3 D. M. & G., 218; *Ex parte Sheppard*, 2 M. D., & D., 431; *Ex parte Moffat*, 1 M. D. & D., 282.

** *Ex parte Downes*, 1 Rose, 96. 1 Rose, 96. *Ex parte Eggington*, Mont., 72; *Ex parte Solomon*, 1 G. & J., 25; *Ex parte Hornby*, Buck, 351.

them, or they may realize their securities, or apply to have them realized under the direction of the Court, and prove for any deficiency.* A secured creditor may also give up his security, and prove for his whole debt.†

“Debts and liabilities proveable.” By the 31st section of the Bankruptcy Act, 1869, all debts and liabilities, present or future, vested or contingent (except demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise), to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, are to be deemed to be “debts proveable in bankruptcy,” and may be proved in the prescribed manner before the trustee in bankruptcy. The term “liability,” for the purposes of the Act, includes any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money’s worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, and is or is not likely to occur, or capable of occurring before the close of the bankruptcy, and generally it includes any express or implied engagement, agreement or undertaking to pay, and capable of resulting in the payment of, money or money’s worth, whether such payment be as respects amounts fixed or liquidated; as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies, as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion. “The language of the Act,” observes Mr. Robson, “as to admissibility to proof, is so comprehensive as to make it very difficult to say what debts or liabilities existing at the date of the order of adjudication will not be proveable.”‡

* 32 & 33 Viet., c. 71, s. 12. Rule 78 *et seq.* 1870. See *White v. Simmons*, 40 L. J. (Ch.), 689; 6 Ch. App., 533; 194 W. R., 939.

† 32 & 33 Viet., c. 71, s. 40.

‡ Robson on Bankruptcy, 2nd Edit., p. 185.

“Valuation of Annuities.” The 175th section of the Bankruptcy Act, 1849,* provides that any annuity creditor of a bankrupt, by whatever assurance the annuity may be secured, or whether there were or not any arrears of such annuity due at the date of the petition for adjudication, shall be entitled to prove for the value of such annuity, which the Court shall ascertain, regard being had to the original price given for such annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof, to the date of the filing of the petition in bankruptcy.

The Bankruptcy Act, 1869, does not contain anything relating to proof in respect of annuities. The 175th section of the Act of 1849 would therefore seem to be still applicable.

“Valuation of Future or Contingent Liabilities.” The 31st section of the Bankruptcy Act, 1869, provides that an estimate shall be made, according to the Rules of Court for the time being in force, as far as the same may be applicable, and when they are not applicable, at the discretion of the trustee, of the value of any debt or liability proveable in bankruptcy, which, by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value. Any person aggrieved by any estimate made by the trustee may appeal to the Court, and the Court may, if it think the value of the debt or liability incapable of being fairly estimated, make an order to that effect, and upon such order being made, such debt or liability shall, for the purposes of that Act, be deemed to be a debt not proveable in bankruptcy; but if the Court thinks that the value of the debt or liability is capable of being fairly estimated, it may direct such value to be assessed, with the consent of all the parties interested, before the Court itself, without the intervention of a jury, or, if such parties do not consent, by a jury, either before the Court itself or some other competent Court, and may give all necessary directions for the purpose, and the amount of such value.

* 12 & 13 Vict., c. 106.

when assessed, shall be proveable as a debt under the bankruptcy.

The learning upon the subject-matter of subsection (2) will be found fully explained in Darby and Bosanquet on the Statutes of Limitation, Part IV., Chapter II., and Part V., Chapter XIX.; Brown on the Law of Limitation, pp. 288-301, and 496-501; Charley on the Real Property Acts, 1874, pp. 58 and 61-67; Dart's Vendors and Purchasers, 351, 352 (4th edition).*

The law is thus briefly stated in Spence in the "Equitable Jurisdiction":†—"As between the *cestui que trust* and trustee, unless the trustee be such by implication or construction of law only, the Statute of Limitations does not apply; the trustee can only discharge himself by accounting to his *cestuis que trust[ent]* in such manner as the Court shall consider that he ought to have done."

The learning upon the subject-matter of subsection (3) will be found fully explained in the notes to the case of *Garth v. Cotton*, in "White and Tudor's Leading Cases in Equity," Waste, pp. 697-767 (4th Edition); and Yool's "Essay on Waste, &c.," Chapter I.‡

Lord Selborne, C., when introducing the present measure, thus summarised this subsection:—

"The distinction between legal and equitable waste is to be done away with."§

The learning on this subject is thus summarised in Spence on the "Equitable Jurisdiction":||—

"A tenant for life without impeachment of waste, will be restrained, though having a legal right so to do, from what has been termed malicious, extravagant or humorsome waste, for instance, the total destruction of a wood or coppice. So he will be restrained from cutting down trees planted or left standing for ornament, whether really or fancifully ornamental, but not merely because they may be

* See *Obee v. Bishop*, 1 D. F. and J., 137; *Burdick v. Garrick*, 5 L. R., (Ch. App.) 233.

† Vol. 2, p. 48.

‡ See *Vane v. Lord Barnard*, 2 Vern, 738; *Marquis of Downshire v. Lady Sandys*, 6 Vesey, 107.

§ Hansard's Parliamentary Debates, New Series, vol. 214, page 360.

|| Vol. 2, pages 571, 572.

really ornamental ; and the protection extends not only to trees about the mansion, but to those in rides and avenues, and to trees or clumps of trees wheresoever growing and though at a considerable distance, if planted and intended for ornament, and though planted by himself. It makes no difference that the original mansion house is pulled down, another may possibly be built for the sake of the trees." It is immaterial that "the inheritance may have been actually improved" by the equitable waste.*

A tenant in tail after possibility of issue extinct, although unimpeachable of waste, is within the principle of equitable waste. And so, also, is a tenant in fee with an executory devise over.

The learning on the subject-matter of the 4th subsection will be found carefully explained in Vol. III. of Preston's Treatise on Conveyancing; Mayhew on the Law of Merger,† and Spence on the Equitable Jurisdiction. The inexorable application of the doctrine of merger at the Common Law may be illustrated by the case of *Stephens v. Bridges*,‡ decided by Sir John Leach, V.C., in 1821. There a term was created in 1720 for 1,000 years. Another term for 500 years was created in 1725. The persons possessed of the term for 1,000 years took an assignment of the term of 500 years and assigned both these terms to certain trustees for sale. The trustees put up the term for 1,000 years for sale, as "an absolute irredeemable term of 1,000 years." On an objection to the title taken by a purchaser, the Vice-Chancellor of England decided that the trustees having united in them the term of 1,000 years, and the right to the reversionary term of 500 years the term of 1,000 years was merged in, or swallowed up by, the reversionary term for 500 years, and the trustees had, therefore, no term of 1,000 years to sell! He declined to say what view a Court of Equity might take of the matter under the circum-

* *Lewis Bowles's Case*, 11 Co., 79; *Williams v. Williams*, 15 Ves., 428; 12 East, 209; *Attorney-General v. Duke of Marlborough*, 3 Madd., 538; *Abraham v. Bubb*, 2 Show., 69, 2 Freem., 52; *Anon*, 2 Freem., 278; *Cooke v. Whalley*, 1 Eq. Ca. Abr., 400.

† See *Nurse v. Yerworth*, 3 Swanst., 608.

‡ Madd. and Geld., 66. Also see *Hughes v. Robotham*, Cro. Eliz., 302.

stances, as he was only called upon to decide whether the vendor of the term of 1,000 years could make a good title in law. It seems strange that a term of 1,000 years should merge in a term of 500 years, but such is the law of the land. Mr. Spence observes:—"The principle of law is that a term merges by union with the inheritance,* whether the interest in the reversion be absolute, or only for a limited period; but upon this subject the Court of Chancery is not guided by the rules of law."† Equity is guided by *the intention, actual or presumed, of the person in whom the interests are united.*‡ Equity will also relieve against the merger of a term in cases of *fraud*, or in order to *do complete justice* to the beneficial owner of the term. See as to illustrations of these two points, temp. Car. II., *Danby v. Danby*, § *Saunders v. Bournford*.|| The doctrine of Equity that the intention of the person in whom the interests are united is to be regarded is forcibly illustrated by the cases relative to the payment off of charges by the tenant in possession. Where debtor and creditor become the same person there is in law an immediate merger or extinguishment of the debt.¶ Equity holds that where a tenant in fee or a tenant in tail in possession pays off a charge upon his estate, the charge is merged in the estate, unless he unequivocally shew his intention that it shall not be merged. On the other hand, if a tenant for life pays off a charge upon the estate out of his own money, the burden of proof is upon those who allege that, in paying off the charge, he intended to exonerate the estate. A tenant in tail without power of alienation** and a tenant in fee with an executory devise over†† stand in this respect on the same footing as a tenant for life.

* It should be "the reversion." See the judgment of V.-C. Leach, *ubi supra*.

† *Forbes v. Moffat*, 18 Ves., 390.

‡ Per Sir William Grant, M.R., in *Forbes v. Moffat*, *ubi supra*.

§ Finch Rep., 220. || Finch Rep., 424.

¶ Per Lord Loughborough, in *Lord Compton v. Oxenden*, 2 Ves. Jun., 263.

** *Shrewsbury v. Shrewsbury*, 1 Ves. Jun., 227.

†† *Drinkwater v. Coombe*, 2 Sim. and St., 340.

Parol evidence will be admissible to show the object the tenant for life had in view in paying off the charge.*

If a trust estate merge at law in a beneficial one, equity will not allow the merger to destroy the trust, or prejudice the rights of the *cestui que trust*,† but will decree possession of the lands, for the time that the estate is merged, to the beneficial owner as against the trustee and all persons claiming under him, or will decree a conveyance, as the circumstances of the case may require.‡

The learning upon the subject-matter of subsection (5) will be found in Coote upon Mortgages; Fisher on Mortgages; Miller on Mortgages; White and Tudor's Leading Cases, Notes to *Thornborough v. Baker*; and Spence on the Equitable Jurisdiction.

The position at the Common Law of a mortgagor left in possession of the mortgaged premises by the mortgagee, is thus described by Mr. Spence:—"He only holds them by the will or permission of the mortgagee, who may, by ejectment and without notice, recover the possession against him or against his tenant under a tenancy created subsequently to the mortgage, and he is not even entitled to reap the crop, in which respect the mortgagor is in a worse condition, as regards his possession, than a tenant at will." In equity, however, "the mortgagee who suffers the mortgagor to remain in possession, is not entitled to call on the mortgagor to account for the rents he has received,§ though the mortgaged property may have become an insufficient security; not even, as it seems, for rents which have been received by the mortgagor after notice to the tenants to pay their rents to the mortgagee."¶

But the more recent work of Mr. Fisher lays down ¶ that "the legal mortgagee, who gives notice to the tenant to pay him the rent, becomes entitled to the rent which is due at the date of the notice, as well as to that which

* *Astley v. Miller*, 1 Sim., 298; *Burrell v. Earl of Egremont*, 7 Beav.. 232.

† *Hopkins v. Hopkins*, 1 Atk., 592; *Lee's Case*, 3 Leo., 110.

‡ See *Nurse v. Yerworth*, 3 Swanst., 608.

§ *Turkington v. Kearman*, Llo. and G., 43.

¶ 2 Spence on the Equitable Jurisdiction, pp. 646, 647.

¶ 2 Fisher on Mortgages, 867, 2nd Edition.

accrues afterwards, whether the lease be made before or after the mortgage, for in the one case the lease is void against the mortgagee, and in the other notice of the mortgage to the tenant operates as an attornment by him."

The present subsection gives the mortgagor in possession, up to the time when the mortgagee gives notice of his intention to take possession, power to sue for the rent in his own name, instead of resorting to the roundabout method of suing in the name of the mortgagee. That nice questions might arise as to the authority of the mortgagor to use the name of the mortgagee, may be gathered from the cases of *Trent v. Hunt*,* and *Snell v. Finch*.†

As the punctual payment of interest to the mortgagee must largely depend on the punctual receipt of the rent by the mortgagor, it is for the manifest benefit of both parties that the mortgagor should be entitled to sue without delay.

There is a proviso at the end of this subsection: "Unless the cause of action arises upon a lease or other contract made by him jointly with any other person." It is apprehended that this merely means that the mortgagor cannot sue "in his own name only" upon a joint demise or joint contract, his co-lessor or co-contractor must join.

The learning on the subject-matter of subsection (6) will be found in 2 White and Tudor's Leading Cases, Notes to *Warmstey v. Lady Tanfield*; 2 Spence's Equitable Jurisdiction.

Subsection (6) of this section contains a most salutary change in the law, by importing into it the equitable doctrines respecting the assignment of debts, and other legal choses in action. "The great wisdom and policy of the sages and founders of our law," in pronouncing things in action to be not assignable (so much vaunted by Lord Coke‡), was happily treated as "foolishness" by the "sages and founders" of the Equitable Jurisdiction. §

* 9 Ex., 14.

† 13 C. B. (N.S.), 651.

‡ *Lampet's Case*, 10 Co., 47.

§ "The Courts of Chancery from the earliest times thought the common law doctrine too absurd for us to adopt." Buller, J., in *Master v. Miller*, 4 T. R., 340.

Mr. Chute,* in his kindly way, making things pleasant all round, has, however, a good word to say, even for the Common Law doctrine in this case :—

“We can easily perceive that in this particular the Common Law rule, that nothing should be assignable which could not be assigned by actual delivery, was preventive of fraud ; thus, in the case of goods, every one could see who was the owner of them by seeing in whose possession they were ; and even in the case of lands, though the title-deeds might prove no more than a life tenancy in the holder thereof, still to that extent the possession of the deeds proved ownership, but when Equity, no doubt to the great convenience and advantage of commerce, introduced the principle of allowing choses in action and equitable interests to be assigned in Equity, it is clear that a road was opened for a new kind of fraud. In the case of most choses in action there is *no badge of ownership* by which it can be known whether there has or has not been a transfer, and thus it is easy to see how the assignment of choses in action and of equitable estates, being abstractions not capable of actual physical possession, as is the case with ownership of personal chattels, and even (through the title-deeds) of real property, opens the way to fraud upon third parties.”

It will be perceived that the language of subsection (6) is very guarded. In order that a legal chose in action may become legally assignable, (1) the assignment must be an “absolute” one ; (2) it must be “by writing under the hand of the assignor ;” (3) it must not “purport to be by way of charge only ;” and (4) “express notice in writing” of the assignment must be “given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim the chose in action.” Even when all these formalities have been scrupulously observed, the assignee will only take, “subject to all equities which would have been entitled to priority over” his “right, if the Act had not passed ;” and he may find himself involved, under the proviso at the end of the subsection, in an

* Equity under the Judicature Act, pp. 57, 58.

interpleader action with "the assignor, or any one claiming under him," or "any other" claimant.

The assignment must be in writing, signed by the assignor, although in equity the assignment might have been by parol.*

The chief advantage which the assignee will derive from the change in the law will be that "all legal remedies" will be, *ipso facto*, transferred to him at the same time with the chose in action, and he will be able to "give a good discharge" for the chose in action to "the person from whom the assignor would have been entitled to claim" it, and this "without the concurrence of the assignor." "Exceptions" have been gradually "eating up the rule," that a chose in action is not assignable at Common Law, but still the old doctrine left its uncomfortable traces in the requirement that the assignee of the chose in action, *e.g.*, of a bond debt, could only sue by power of attorney in the name of the assignor, or original creditor. The legislature has at length acted on the view of Mr. Justice Buller:—"I see no use or convenience in preserving that shadow when the substance is gone."† The assignee of a bond debt will now be able to sue in his own name.

The most important ceremony to be performed by the assignee, in order to perfect his title, is to give notice in writing of the assignment to the debtor, trustee, or other person from whom the assignor would have been entitled to claim the chose in action. The notice must be "express:" "constructive" notice—that blot upon the equitable doctrine of notice—will be insufficient.

It will be seen that the spirit of the maxim, "He who comes into equity must do equity," has been preserved in this case by the qualifying clause in brackets, "Subject to all equities which would have been entitled to priority if this Act had not passed."‡

By Order I., Rule 2, of the first Schedule to the Supreme

* Per Lord Mansfield, C. J., in *Heath v. Hall*, 48 Taunt., 328; 2 Rose, 271.

† *Master v. Miller*, 4 T. R., 341.

‡ See, on this subject, the following recent cases: *Henry Holden's case*, L.R., 8 Eq., 444, 448. *South Blackpool Hotel Company*, *Ib.* 25; *Re*

Court of Judicature Act, 1875, "the procedure and practice now used by Courts of Common Law under the Interpleader Acts, 1 and 2 Wm. IV., c. 58, and 23 and 24 Vict., c. 126, shall apply to all actions and all the Divisions of the High Court of Justice."

The Acts for the relief of trustees, referred to in the proviso at the end of this subsection, are the 10 and 11 Vict., c. 96, and 12 and 13 Vict., c. 74.*

The learning upon the subject-matter of subsection (7) will be found in Sugden's Vendors and Purchasers; Dart's Vendors and Purchasers; and 2 White and Tudor's Leading Cases in Equity, Notes to *Seton v. Slade*.

"At law," said Lord Romilly, M.R., in *Parkin v. Thorold*,† "time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it. This is not the doctrine of a Court of Equity. Courts of Equity make a distinction between that which is matter of substance and that which is matter of form, and if it finds that by insisting on the form the substance will be defeated, it holds it to be inequitable to insist on such a form, and thereby defeat the substance."

Specific performance of contracts is frequently enforced in Equity, where, if time were considered to be of the essence of the contract, the contract must inevitably be regarded as at an end. The delay of a single day, for example, in the delivery of the abstract of title would invalidate the contract for sale of land at law,‡ though the delay may have been unavoidable. But in Equity, a stipulation for delivery of an abstract on a certain day is considered to have been waived if the purchaser *does not ask for it within a reasonable time* before the day fixed for its delivery.§ So an express stipulation that time shall be of the essence of the contract

Northern Assam Tea Company, L. R., 10 Eq., 458; *Rodger v. Comptoir d'Escompte de Paris*, L. R., 2 P. C., 393, 405; *Re Imperial Land Company of Marseilles, ex parte Colborne and Strawbrige*, 42 L. J., ch., 372.

* See also 28 and 29 Vict., c. 99, s. 1; 30 and 31 Vict., c. 142, ss. 24, 25 (s. 3 of 10 and 11 Vict., c. 96, is repealed by 35 and 36 Vict., c. 44, s. 26).

† 16 Beav. 59, 65.

‡ See *Berry v. Young*, 2 Esp., 640 n.

§ *Guest v. Hornby*, 5 Ves., 818, 823; *Jones v. Price*, 3 Aust., 924.

is considered in Equity to have been waived by a purchaser who receives and retains without objection an abstract upon the face of which it appears that a title cannot be made within the time fixed for completion.*

Another class of cases illustrative of this subsection is where the vendor seeking to enforce specific performance has not the same interest in the estate which he contracted to sell, or there is some deficiency in the quantity or quality of it. The vendor would, in these cases, have no remedy against the purchaser by action at law for damages for breach of contract.† But in Equity he would be able to obtain specific performance, if adequate compensation could be made by him to the purchaser for the difference in value between what the latter would actually get and what he stipulated for.‡

Again, it may be laid down as a general rule that a purchaser may, if he chooses, compel a vendor, who has contracted to sell a larger interest than he has, to convey to him such interest as the vendor actually is entitled to, with compensation.§

“Passing.” See s. 10 of Amending Act.

Subsection (8). Order LII., of the first Schedule to the Supreme Court of Judicature Act, 1875, contains an express reference to this subsection:—“An application for an order under section 25, subsection 8, of the [Principal] Act, may be made to the Court or a Judge by any party. If the application be by the plaintiff for an order under the said subsection 8, it may be made either *ex parte* or with notice; and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application.” This is Rule 4. Rules 1, 2 & 3 contain valuable provisions (copied *verbatim* from the Schedule to this Act), relative to “*interim orders*

* See *Hipsell v. King*, N.S., 1 W. C., 401, 419.

† And the purchaser might recover back his deposit. *Farrer v. Nightingale*, 2 Esp., 639; *Hibbert v. Shee*, 1 Camp., 113.

‡ *Halsey v. Grant*, 13 Ves., 77; *Twining v. Morrice*, 2 Bro. C. C., 326; *Esdale v. Stephenson*, 1 S. & S., 122.

§ See *Mortlock v. Buller*, 10 Ves., 315; *Lord Bolingbroke's case*, 1 S. & L., 19 n. (a); *Nelthorpe v. Holgate*, 1 Coll., 203; *Barnes v. Wood*, 8 L. R., Eq., 424.

as to the subject-matter of litigation," "power to make orders for the sale of goods," and "power for the Court to make *interim* orders as to the preservation or examination of property, examination of witnesses, &c."

The order is headed, "Interlocutory Orders as to Mandamus (*sic*) Injunctions or Interim Preservation of Property." This heading (*teste* Mr. Raikes) forms no part of the first Schedule to the Amending Act, and it bears traces of the hand of an amateur. The phrase "Mandamus Injunctions" may either mean "Mandamus or Injunctions," or "Mandatory Injunctions." "Mandamus or Injunctions" is the expression used in subsection (8).

As regards subsection (8), Lord Selborne, in his opening remarks, when introducing the present measure, said:—"It is proposed to remove certain technical impediments now existing in equity, in the way of applications for injunctions and the appointment of receivers."* No allusion to "Mandamus" was made by Lord Selborne.

The reference to "Mandamus" in subsection (8) may, perhaps, indicate an intention on the part of the legislature to extend the benefits of Section 68 of the Common Law Procedure Act, 1854, which enables the plaintiff to claim a writ of mandamus "commanding the defendant to fulfil any [public or *quasi*-public] duty, in the fulfilment of which the plaintiff is personally interested." The only other interpretation which can be put upon the subsection is, that it is intended that the jurisdiction of the Court of Queen's Bench to issue the High Prerogative Writ of Mandamus shall be shared in future by that Court with the other Divisions of the High Court of Justice, but this would be hardly consistent with the provisions of s. 34, *infra*. (But see note to s. 45, *infra*.)

The jurisdiction of the Court of Chancery to grant injunctions and appoint receivers, the one for the *prevention of wrong*, the other for the *preservation of property*, was exercised by it, because it was a great hardship in many cases that a plaintiff should be left to the uncertain remedy of damages at the Common Law, which the personal

* Hansard's Parliamentary Debates, New Series, vol. 214, p. 340.

estate of the defendant might, perhaps, not be able to satisfy.*

Vice-Chancellor Kindersley, in *Lowndes v. Bettle*,† made some remarks, which throw considerable light upon this subsection, and upon the allusion of Lord Selborne to “certain technical impediments.” “The proper mode,” said the Vice-Chancellor, “is to classify the cases under two heads, the one where the party against whom the application for the injunction is made is in possession; and the other, where the plaintiff is in possession, and is asking the Court to protect his estate.” The Vice-Chancellor then proceeded to review the cases in which the defendant, *i.e.*, “the person against whom the injunction” was sought, was “in possession,” citing, amongst other things, an observation of the Court in *Talbot v. Hope*,‡ that the Court is much more reluctant to entertain a suit against a person in possession, than when he is not in possession. The Vice-Chancellor summed up the result of the cases on this branch of the subject as follows:—“The result of these cases is that where the plaintiff is out of possession, the Court will refuse to interfere by granting an injunction, unless there be fraud or collusion, or unless the acts perpetrated or threatened are so injurious as to tend to the destruction of the estate.”§ It appears from the Vice-Chancellor’s review of the cases, that Sir William Grant,|| Lord Justice Knight Bruce,¶ and Vice-Chancellor Wigram,** when allowing demurrers to bills praying for injunctions, where the defendant was in possession, expressed surprise and dissatisfaction with the state of the law (or rather, of the “equity”).

“The cases,” continued Vice-Chancellor Kindersley, in *Lowndes v. Bettle*,†† “where the plaintiff is in possession,

* Chute on Equity under the Judicature Act, p. 153.

† 33 L. J. (Ch.), 431.

‡ 4 K. & J., 108.

§ See *Lancashire v. Lancashire*, 9 Beav., 120.

|| In *Jones v. Jones*, 3 Mer., 161.

¶ In *Haigh v. Jaggard*, 2 Coll., 231.

** In *Davenport v. Davenport*, 7 Ha. 217.,

†† 33 L. J. (Ch.), 451.

may be divided into two subordinate heads: first, where the defendant claims under colour of right; and, secondly, where he is an absolute stranger." After reviewing the cases on these two branches of the second part of the subject, the Vice-Chancellor summed up as follows:—"When the plaintiff is in possession, and the person doing the acts complained of is an utter stranger not claiming under colour of right, the tendency of the Court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law; though where the acts tend to the destruction of the estate, the Court will grant it. But where the party in possession seeks to restrain one who claims by adverse title, there the tendency will be to grant the injunction."

The "technical impediments," referred to by Lord Selborne in the way of applications for the appointment of receivers, are thus stated by Mr. Chute:—*

"The Court will generally provide for the safety of property pending litigation, by ordering the property to be brought into Court, or to be collected by a receiver. But it has generally been held that the Court would not appoint a receiver at the instance of a person claiming by a title which he might enforce by ejectment; such a bill was called an ejectment bill, and would be dismissed, and the plaintiff would be turned over to the Common Law Court. Thus, where there were three persons claiming real property by three independent titles, and one of them asked for a receiver *pendente lite*, it was held, on appeal, that the Court had no jurisdiction to grant one.† So, where the plaintiff, entitled to an annuity payable out of leasehold property, came to ask for a receiver of his annuity, it was held that, as he had a power of distress by 4 Geo. II., c. 28, to recover the annuity, the Court would give no relief; but it was said, that if an annuity has been long in arrear, and a distress would not enable the annuitant to raise the amount due, a receiver might be necessary.‡ A plaintiff will no more have his suit dismissed for

* Equity under the Judicature Act, 163, 164.

† *Carrow v. Ferrior*, L. R., 3 Ch., 719.

‡ *Kelsey v. Kelsey*, L. R., 17 Eq., 495.

coming to the wrong Court, but a receiver will be granted, if just and convenient, whether the estate claimed be legal or equitable."

The subsection now under discussion sweeps away, it will be perceived, in its studied and wide-reaching terms, all the petty distinctions, which have been so laboriously built up by the Court of Chancery, and the new Courts will start with much larger powers of granting injunctions than the Court of Chancery had. The latter part of the subsection only applies, it will be seen, to injunctions, although Mr. Chute appears to think that it applies also to receivers.*

Subsection (9.) "The ancient rule of the Court of Admiralty," as it is termed by Lord Stowell, is tersely described by Dr. Lushington in the case of *The Linda*.† "It was decided the other day that both these vessels were to blame for the collision. According to the law of this Court the damage arising therefrom is to be divided between the owners of the two vessels; if there had been a cross action, the cost of the damage received by both vessels would also have been equally divided. At Common Law the case is different; there the plaintiff can recover nothing unless he shows that he was free from all blame." So inexorably was this principle applied, that the innocent owner of the cargo on board the sunken vessel could only recover a moiety of his damage from the owners of the vessel that sunk her, where both vessels were to blame for the collision.‡

The Admiralty rule has been accepted by Cleirac, Valin, Kuricke, Grotius, Vander Linden, Vinnius, Emerigon, Pardessus, Boulay-Paty, and Pailliet, and is the law of the French "Code de Commerce." § It has, however, been called the *judicium rusticorum*, the rule of arbitrators who compromise when they cannot decide. ||

* Mr. Chute appears, on the other hand, to think that the refusal to grant injunctions, where the plaintiff is out of possession, will continue as before (see p. 106). A foot-note, however, shows that he saw that this would be inconsistent with the express terms of the enactment.

† 4 Jur. (N.S.), 146.

‡ See *The Milan*, Lush. 388.

§ Code de Com., Art. 407.

|| MacLachlan on Merchant Shipping, 2nd Edition, p. 287.

As subsection (9) originally stood, it abolished the Admiralty rule, and substituted for it the Common Law rule.

Lord Selborne, C., thus explained subsection (9), as it originally stood, in his opening remarks on the introduction of the present measure in 1873 :—

“In respect of collisions at sea it is proposed to adopt, instead of a rule which now holds good in the Court of Admiralty, the rule of Common Law as to contributory fault or contributory negligence. The rule of law is, that if the plaintiff is equally in the wrong, he cannot recover from the defendant, and if the defendant is equally in the wrong, he cannot recover from the plaintiff. But what the Court of Admiralty does is this. If two ships run into each other and both go to the bottom, as I understand the practice, the Court of Admiralty adds the value of both ships, and then divides the total between the two parties. So that if I were the owner of a ship worth only £10,000, and one of your lordships was the owner of one worth £50,000, you see how ill I would fare in comparison with the owner of the better ship, if both vessels went down after a collision.” *

The learned Registrar of the Court of Admiralty,† addressed an exceedingly able letter to Lord Selborne, in defence of the rule of the Court of Admiralty, which led not merely to the preservation of the rule of the Court of Admiralty in the Admiralty Division of the High Court, but to its extension to the other Divisions of that Court, in substitution for the Common Law rule.

The letter which brought about this remarkable change has fortunately been preserved by Mr. David MacLachlan, in the second edition of his celebrated “Treatise on the Law of Merchant Shipping;”‡ and it is here reproduced :—

“I will take your lordship’s figures, and will assume that A. and B. are the owners of two vessels worth respectively £10,000 and £50,000 : that they come into collision, and that both alike are to blame for the collision, that being a condition precedent to the equal division of the damages. And first I will assume that A.’s vessel goes to the bottom,

* Hansard’s Parliamentary Debates, New Series, vol. 214, p. 340.

† Mr. Rothery.

‡ P. 287, n. (2.)

and that B.'s is uninjured, a not very unusual occurrence in collisions at sea. Then A, who has lost £10,000 by the sinking of his vessel, would, under the Admiralty rule, be entitled to recover one-half of his loss, or £5,000, from B. Secondly. Let us assume that B.'s vessel goes to the bottom, and that A.'s is uninjured; then B., who has lost £50,000 by the sinking of his vessel, will be entitled to recover one moiety of his loss, or £25,000 from A. Thirdly. I will suppose that both go to the bottom; then A., having lost £10,000 by the sinking of his vessel, is entitled to recover £5,000 from B. for a moiety of his damage, whilst B. is entitled to recover £25,000 from A. for the moiety of his damage. *Each loses £30,000*; A., by having to bear the loss of the moiety of his own vessel, or £5,000, and by having to pay to B. £25,000 for the moiety of his, B.'s, loss; and B. by having to bear the loss of one moiety of his own vessel, or £25,000, and by having to pay to A. £5,000 for the moiety of his, A.'s loss. The mistake of those who think that the owner of a vessel worth £10,000 might, by a collision with a vessel worth £50,000, recover, under the Admiralty law, no less a sum than £30,000* as compensation, arises from their supposing that the amount at stake is a common fund to be divided between two claimants, not a *joint loss* which has to be apportioned between them.

“Let us now see what the result would be under the Common Law rule, where, if both are to blame, neither can recover anything. In the first of the three cases cited above, the whole loss of £10,000 would fall upon A.; in the second the whole loss of £50,000 would fall upon B.; and in the third case, B.'s loss would be £50,000, while A.'s loss would be only £10,000, or one-fifth part that of B.”

The learning on the subject-matter of the 10th subsection will be found in Spence on the Equitable Jurisdiction; Story's Equitable Jurisprudence; Forsyth on the Custody of Infants; and Macpherson on the Law of Infants. The Sovereign, as *parens patriæ*, has the care of infants, or rather of their property, where there is nobody else to take care of them or it, or when there is somebody else,

* i.e., £10,000 + £50,000 = £60,000; £60,000 ÷ 2 = £30,000.

and he neglects his duty; and this prerogative of the Sovereign is wielded by the Court of Chancery. The Court of Chancery is a thoroughly domestic forum as regards infants, whom (or whose property) it takes under its beneficent sway. It will deprive even the father, if grossly immoral or cruel, of the custody of his children, will regulate the conduct of guardians, appoint them and remove them at pleasure, assist them in compelling their wards to go to school, arrest and imprison anyone who, without its permission, marries or otherwise interferes with infants under its care for contempt of Court, will intercept by injunction all communications between its ward and an ineligible admirer, will direct a suitable maintenance or match for its infants, and control them in the management of their property. How much more consonant with reason and justice are the rules of Equity, in questions relating to the custody and education of infants, than those of the Common Law, is well illustrated by the recent case of *Andrews v. Salt*.

Thomas Andrews, a Roman Catholic, entered into a parol antenuptial engagement with Ellen Fleetcroft, a Protestant, that of the issue of their intended marriage the males should be educated in the religion of their father, the females in that of their mother. There was issue of the marriage (which was solemnized in March, 1854) a son and a daughter. The son was baptized and brought up as a Roman Catholic. The daughter, who was born in June, 1862, was baptized as a Protestant, with Protestant sponsors. Thomas Andrews died when his little daughter, Ellen, was only nine months old. Ellen lived with her maternal grandmother (the widow having married again), attended a Protestant Church, and was brought up in the principles of the Protestant religion, without any objection from anyone, until she was nine years of age. In 1871 her paternal uncle, Joseph Andrews, obtained a rule in the Court of Queen's Bench, calling upon the minor's maternal grandmother to shew cause why a writ of *Habeas Corpus* should not issue directing her to bring up the body of Ellen Andrews, in order that she might be handed over to the custody of her paternal uncle, as her testamentary guardian. It then appeared that exactly two days before

his death Thomas Andrews executed a will which appointed his brother Joseph testamentary guardian of his children.* As the testator had no property, the will does not seem to have contained anything else except this appointment. The Court of Queen's Bench held that they had no discretion to refuse the writ. "It is with great regret," said Mr. Justice Archibald, "that notwithstanding the lateness of the application, and the apparent harshness of such a proceeding towards the grandmother of the child, we have no discretion to refuse the writ, and we are bound to hand over the child to the custody of the testamentary guardian."† The absurdity and cruelty of this decision is at once apparent, and yet the Court of Queen's Bench was "bound" by the iron fetters of Statute and Case Law so to decide. The intervention of the Court of Chancery was invoked, and successfully invoked, by the child's maternal relatives. Vice-Chancellor Malins granted an injunction to restrain the paternal uncle, Joseph Andrews, from interfering with the custody or education of the child, and for the settlement of a proper scheme for her education, and for the appointment of a guardian. On an appeal to the Lords Justices the decision of the Vice-Chancellor was affirmed,‡ on the ground that when a father has forfeited or abandoned his right to educate his children in his own religion, the Court of Chancery will consider only the happiness and benefit of the child, and will order it to remain in the care of those by whom it has been brought up, and to be educated in their religion.

An absurd ceremony had in this case to be performed before the aid of the Court of Chancery could be invoked. The mother's relatives had to put £20 in the name of trustees for the child, and then file a bill to make her a ward in Chancery, and to administer the trust money! The Court of Chancery could then, but not till then, interfere, because it was dealing with trust property, and with the guardianship of its own ward, and not with legal rights and Acts of Parliament.

By s. 34 of this Act, "the wardship of infants, and the

* Under 12 Car. 2, c. 24, s. 8. † L.R., 8 Q. B., 153, 160.

‡ L. R., 8 Ch. App., 622.

care of infants' estates," are assigned to the Chancery Division of the High Court. When, therefore, it is stated in this subsection that, "in questions relating to the custody and education of infants, the rules of Equity shall prevail," it is not, it is apprehended, meant that the jurisdiction expressly conferred upon the Chancery Division of the High Court shall be conferred upon the Common Law Divisions of the High Court, but that, when, *e.g.*, the Court of Queen's Bench is called upon to issue a writ of *Habeas Corpus* under circumstances like those in *Andrews v. Salt*, that Court will be bound to take judicial notice of the countervailing rules of Equity, and to hold them to be paramount to, and to override the narrow view to which the Court has hitherto been compelled to give effect. This being so, it will, it is apprehended, be wholly unnecessary to invest, in a like case, £20 in the names of trustees, and to make the infant a ward in Chancery, in order to secure what subsection 7 of the last section calls a complete and final determination of the matter in controversy between the parties.

The eleventh subsection of this section introduces an important new rule respecting conflicting rules of Equity and Common Law, viz.:—Where the rules of Equity and of Common Law are in conflict, the rules of Equity shall prevail.

Lord Selborne, C., when introducing the present measure, alluded to this subsection:—

"It may be asked, though I do not think the question would be put by those who are well acquainted with the subject—why not abolish at once all distinction between law and equity? I can best answer that by asking another question—do you wish to abolish trusts? If trusts are to continue, there must be a distinction between what we call a legal estate and an equitable estate. The legal estate is in the person who holds the property of another; the equitable estate is in the person beneficially interested. The distinction, within certain limits, between law and equity is real and natural, and it would be a mistake to suppose that what is real and natural ought to be disregarded, although under our present system it is often pushed beyond these limits. I content myself with saying

that those rights and remedies which belong to the system of law and jurisdiction under which we actually live, and which are consistent with each other, should be equally recognised, and effect given to them in all branches of the Court. There are some points, however, in which, from this division of jurisdiction, unnecessary discrepancies have been introduced by reason of arbitrary rules established in different Courts. They are not very numerous. It is possible that some may have been overlooked, and on the suggestion of a high authority I have added in the Bill general words to provide that where there is any variance between the rules of law and those of equity, and the matter is not expressly dealt with, the rules of equity shall prevail.”*

By section 91 of this Act, *infra*, the several rules of law enacted and declared by the present section are to be in force and receive effect in all Courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognisable by such Courts.

PART III.

SITTINGS AND DISTRIBUTION OF BUSINESS.

Section 26.—Abolition of Terms.

The division of the legal year into terms shall be abolished so far as relates to the administration of justice; and there shall no longer be terms applicable to any sitting or business of the High Court of Justice, or of the Court of Appeal, or of any Commissioners to whom any jurisdiction may be assigned under this Act; but in all other cases in which, under the law now existing, the terms into which the legal year is divided are used as a measure for determining the time at or within

* Hansard's Parliamentary Debates, New Series, vol. 214, p. 339.

which any act is required to be done, the same may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority. Subject to Rules of Court, the High Court of Justice and the Court of Appeal, and the Judges thereof respectively, or any such Commissioners as aforesaid, shall have power to sit and act, at any time, and at any place, for the transaction of any part of the business of such Courts respectively, or of such Judges or Commissioners, or for the discharge of any duty which by any Act of Parliament, or otherwise, is required to be discharged during or after term.

It will be perceived that terms are not entirely abolished by this section (as the marginal note would seem to imply), but only "so far as relates to the administration of justice."

The Rules of Court regulating the sittings and vacations will be found in the first Schedule to the Supreme Court of Judicature Act, 1875, Order LXI.

Section 27.—Vacations.

Her Majesty in Council may from time to time, upon any report or recommendation of the Judges by whose advice Her Majesty is hereinafter authorised to make rules before the commencement of this Act, and after the commencement of this Act upon any report or recommendation of the Council of Judges of the Supreme Court hereinafter mentioned, with the consent of the Lord Chancellor, make, revoke, or

modify, orders regulating the vacations to be observed by the High Court of Justice and the High Court of Appeal, and in the offices of the said Courts respectively; and any Order in Council made pursuant to this section shall, so long as it continues in force, be of the same effect as if it were contained in this Act; and Rules of Court may be made for carrying the same into effect in the same manner as if such Order in Council were part of this Act. In the meantime, and subject thereto, the said vacations shall be fixed in the same manner, and by the same authority, as if this Act had not passed. This section shall come into operation immediately upon the passing of this Act.

This section being expressly excepted from section 2, *supra*, came in force on the 5th of August, 1873, the day on which this Act received the Royal assent.

The Rules of Court regulating "the vacations to be observed in the High Court of Justice and High Court of Appeal," will be found, as already stated, in Order LXI. of the Supreme Court of Judicature Act, 1875.

By section 17 of the Supreme Court of Judicature Act, 1875, it is provided "that the reference to certain Judges in section 27 of the principal Act shall be deemed to refer to the Judges mentioned in" that (the 17th) "section" (of the Amending Act) "as the Judges on whose recommendation an Order in Council may be made." The "certain Judges" referred to in the 17th section of the Amending Act are "the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron, and the Lords Justices of Appeal in Chancery, or any five of them, and the other Judges of the several Courts intended to be united and consolidated by the Principal

Act as amended by that Act, or a majority of such other Judges.”

As to the Council of Judges, see s. 75, *infra*.

Section 28.—Sittings in Vacation.

Provision shall be made by Rules of Court for the hearing, in London or Middlesex, during vacation by Judges of the High Court of Justice and the Court of Appeal respectively, of all such applications as may require to be immediately or promptly heard.

The “provision” expressly “made” pursuant to this section, will be found in the first Schedule to the Supreme Court of Judicature Act, 1875, Order LXI., Rules 5 and 6.

SECTION 29.—Jurisdiction of Judges of High Court on Circuit.

Her Majesty, by commission of Assize or by any other commission, either general or special, may assign to any Judge or Judges of the High Court of Justice or other persons usually named in commission of Assize, the duty of trying and determining within any place or district specially fixed for that purpose by such commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the said High Court, or in the exercise of any civil or criminal jurisdiction capable of being exercised by the said High Court; and any commission so granted by Her Majesty shall be of the same

validity as if it were enacted in the body of this Act; and any Commissioner or Commissioners appointed in pursuance of this section shall, when engaged in the exercise of any jurisdiction assigned to him or them in pursuance of this Act, be deemed to constitute a Court of the said High Court of Justice; and, subject to any restrictions or conditions imposed by Rules of Court and to the power of transfer, any party to any cause or matter involving the trial of a question or issue of fact, or partly of fact and partly of law, may, with the leave of the Judge or Judges to whom or to whose Division the cause or matter is assigned, require the question or issue to be tried and determined by a Commissioner or Commissioners as aforesaid, or at sittings to be held in Middlesex or London as hereinafter in this Act mentioned, and such question or issue shall be tried and determined accordingly.

A cause or matter not involving any question or issue of fact may be tried and determined in like manner with the consent of all the parties thereto.

As to the re-arrangement of Circuits, see section 23 of the Supreme Court of Judicature Act, 1875, and the note thereto.

“Commission of Assize.” The abolition of Assizes, and other real actions has thrown the Commission of Assize, as distinguished from the Commission of Nisi Prius, out of force.* “Or any other commission.” There are practically now four several authorities, by virtue of which Judges

* Stephen's Commentaries, 7th Ed., vol. 3, p. 352.

sit upon Circuit* :—1. The Commission of the Peace ; 2. A Commission of Oyer and Terminer ; 3. A Commission of General Gaol Delivery ; 4. A Commission of Nisi Prius. The Judicature Commission in their First Report† made the following recommendation :—“ We think that in lieu of the ordinary Assize commissions, *one Commission only* should be necessary for each Circuit.” In their Second Report‡ they recommended “ that actions to be tried elsewhere than in the Metropolis, or Liverpool, or Manchester, should be tried under commissions to be issued from time to time by your Majesty for the trial of causes *at any place or places* named in such commissions.”

The “ other persons usually named ” are specified in section 37, *infra* (which must be read in connection with this section), *i.e.*, “ any serjeant-at-law, or any of Her Majesty’s counsel learned in the law.”§ “ Any judge or judges of the High Court of Justice.” Section 37 enables Her Majesty to include in any such commission “ any Ordinary Judge of the Court of Appeal.” Two of these will be the Lords Justices of Appeal.

“ Rules of Court.” Order XXXVI., Rule 29, of the first Schedule to the Supreme Court of Judicature Act, 1875, expressly refers to this section :—

“ In any cause the Court or a Judge of the Division to which the cause is assigned, may, at any time or from time to time, order the trial and determination of any question or issue of fact, or partly of fact and partly of law, by any Commissioner or Commissioners appointed in pursuance of the 29th section of the said Act, or at the sittings to be held in Middlesex or London, and such question or issue shall be tried and determined accordingly.”

Rule 1 of the same Order states that “ where no place of trial is named in the statement of claim, the place of trial shall, unless a Judge otherwise orders, be the county of Middlesex, and that any order of a Judge as to the place of trial may be discharged or varied by a Divisional Court of the High Court.”

* See the 5th Report of the Judicature Commission, p. 48. (2nd Appendix, on Courts and Assizes.)

† P. 17.

‡ P. 21.

§ See 13 & 14 Vict., c. 25, which also includes in the same category as Serjeants and Queen’s Counsel, barristers having a patent of precedence.

See further as to the place of trial, Rule 6 of the same Order, and also Order XXXV, Rules 12, 13, 14 and 15, as to the removal of actions from the District Registry to London.*

“The power of transfer.” See section 36, *infra*. Also Order II, Rules 1 and 2 of the first Schedule to the Supreme Court of Judicature Act, 1875, and subsection 2 of section 11 of that Act.

SECTION 30.—*Sittings for trial by Jury in London and Middlesex.*

Subject to Rules of Court, sittings for the trial by jury of causes and questions or issues of fact shall be held in Middlesex and London, and such sittings shall, so far as is reasonably practicable, and subject to vacations, be held continuously throughout the year by as many Judges as the business to be disposed of may render necessary. Any Judge of the High Court of Justice sitting for the trial of causes and issues in Middlesex or London, at any place heretofore accustomed, or to be hereafter determined by Rules of Court, shall be deemed to constitute a Court of the said High Court of Justice.

“Subject to Rules of Court.” By Order V, Rule 1 of the first Schedule to the Supreme Court of Judicature Act, 1875, “in any action, other than a Probate action, the plaintiff, wherever resident, may issue a writ of summons out of the registry of any district. If the defendant resides within the district, he *must*, by Order XII., Rule 2, appear to such a writ in the District Registry.

* “London,” in these Rules, is probably a popular term for Middlesex.

But by Order XXXV., Rule 13, any party to the action may apply for an order to remove the action to London; and, in the cases specified in Rule 11 of Order XXXV., the defendant may remove the action to London, *as of right*. The Rules of Court relative to trials in Middlesex and London will be found in Order XXXVI.

The "place heretofore accustomed" is, of course, the Guildhall. It is to be feared that it will continue to be the "accustomed place" until it is "hereafter"—probably at some rather distant date—"determined by Rules of Court" to remove the sittings to the new Palace of Justice.

This section contains a most beneficial enactment, that "the sittings in Middlesex and London shall, so far as is reasonably practicable, and subject to vacation, be held CONTINUOUSLY THROUGHOUT THE YEAR." The number of remanets left in the Court of Queen's Bench at Guildhall has been a disgrace to our system of Judicature, and the Judges of that Court have been powerless to remedy it.*

This enactment is based on the recommendations of the Judicature Commission. In their First Report they said: "These sittings should be held continuously throughout the legal year."† In their Second Report they referred to and enforced their previous recommendation.

* Commenting on this state of things, the *Law Journal* of December 19th, 1874, observes: "The cause lists at the Guildhall would present matter for very serious reflection if we were not so near a thorough reform of the mischiefs exhibited by them. In the Court of Queen's Bench there was, at the opening of the Court on the 10th inst., a list of 274 causes, about 160 were 'remanets,' of the whole list at least 100 causes were marked for special juries. On an average special jury cases take a day for trial; so by the end of the twelve days the state of the special jury cause list will not be very different from what it was at the start. In the Court of Exchequer there was a list of 197 causes, and of these 65 were marked for special juries. In the Court of Common Pleas there was a list of 101 causes. There were 17 special jury causes in the list of 'remanets,' and only 19 new special jury causes. It would puzzle the most ingenious to discover why the Court which but a few years ago had almost a monopoly of the heavy commercial causes, is now almost deserted by the great City attorneys. However, this plethora in one Court and inanition in another will be remedied by the Judicature Act, while something like continuity of sittings will at length digest the mass which has so long been the worst symptom in our legal system."

† P. 16.

SECTION 31.—*Divisions of the High Court of Justice.*

For the more convenient despatch of business in the said High Court of Justice (but not so as to prevent any Judge from sitting, whenever required, in any Divisional Court, or for any Judge of a different Division from his own), there shall be in the said High Court five Divisions consisting of such number of Judges respectively as hereinafter mentioned. Such five Divisions shall respectively include, immediately on the commencement of this Act, the several Judges following; (that is to say),

- (1.) One Division shall consist of the following Judges; (that is to say), the Lord Chancellor, who shall be President thereof, the Master of the Rolls, and the Vice-Chancellors of the Court of Chancery, or such of them as shall not be appointed Ordinary Judges of the Court of Appeal:
- (2.) One other Division shall consist of the following Judges; (that is to say), The Lord Chief Justice of England, who shall be President thereof, and such of the other Judges of the Court of Queen's Bench as shall not be appointed Ordinary Judges of the Court of Appeal:
- (3.) One other Division shall consist of the following Judges; (that is to say), The

Lord Chief Justice of the Common Pleas, who shall be President thereof, and such of the other Judges of the Court of Common Pleas as shall not be appointed Ordinary Judges of the Court of Appeal:

- (4.) One other Division shall consist of the following Judges: (that is to say), The Lord Chief Baron of the Exchequer, who shall be President thereof, and such of the other Barons of the Court of Exchequer as shall not be appointed Ordinary Judges of the Court of Appeal:
- (5.) One other Division shall consist of two Judges who, immediately on the commencement of this Act, shall be the existing Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes and the existing Judge of the High Court of Admiralty, unless either of them is appointed an Ordinary Judge of the Court of Appeal. The existing Judge of the Court of Probate shall (unless so appointed) be the President of the said Division, and subject thereto the Senior Judge of the said Division, according to the order of precedence under this Act, shall be President.

The said five Divisions shall be called respec-

tively the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division.

Any deficiency of the number of five Judges for constituting, in manner aforesaid, immediately on the commencement of this Act, any one or more of the Queen's Bench, Common Pleas, and Exchequer Divisions, may be supplied by the appointment, under Her Majesty's Royal Sign Manual, either before or after the time fixed for the commencement of this Act, of one of the Puisne Justices or Junior Barons of any Superior Court of Common Law from which no Judge may be appointed as aforesaid to the Court of Appeal, to be a Judge of any Division in which such deficiency would otherwise exist. And any deficiency of the number of three Vice-Chancellors or of the two Judges of the Probate and Admiralty Divisions at the time of the commencement of this Act may be supplied by the appointment of a new Judge in his place in the same manner as if a vacancy in such office had occurred after the commencement of this Act.

Any Judge of any of the said Divisions may be transferred by Her Majesty, under Her Royal Sign Manual, from one to another of the said Divisions.

Upon any vacancy happening among the Judges of the said High Court, the Judge appointed to fill

such vacancy shall, subject to the provisions of this Act, and to any Rules of Court which may be made pursuant thereto, become a member of the same Division to which the Judge whose place has become vacant belonged.

It will be perceived that the utmost respect has been shown by the Legislature to the Conservative instincts of the legal profession in framing this section. There will, practically, be no "outward and visible" manifestation of the union of the Superior Courts of Law and Equity into one Supreme Court. The Courts will generally sit, at least until the Palace of Justice is completed, in the "place heretofore accustomed." The concurrent administration of the principles of law and equity by each of the existing Courts, the infusion of the spirit and the transferring of many of the forms of Chancery pleading and practice into the Common Law Divisions, and *vice versa*—these will be the plastic influences which will gradually but surely mould the five Divisions of the High Court into one complete and harmonious whole.

The distribution of the High Court of Justice into "Divisions," and not only so but into the precise number of five Divisions, was suggested by the Judicature Commissioners in their First Report:—*

"The Supreme Court would, of course, be divided into as many Chambers or Divisions as the nature and extent or the convenient despatch of business might require. . . . We consider it expedient, *with a view to facilitate the transition* from the old to the new system, and to make the proposed change at first as little inconvenient as possible, that the Courts of Chancery, Queen's Bench, Common Pleas and Exchequer should, *for the present*, retain their distinctive titles, and should constitute so many Chambers of the Supreme Court, and as regards the Courts of Admiralty, Divorce and Probate, we think it would be convenient that those Courts should be consolidated, and form one Chamber or Division of the Supreme Court."

As to "the existing Judge of the High Court of Admiralty," see section 8 of the Amending Act, the provisions of which will account for the precedence given by subsection (5) of the present section to the existing Judge of the Court of Probate. The words in brackets—"but not so as to prevent," &c., are founded on the following passage in the First Report of the Judicature Commission :*—"From the consolidation of all the present Superior Courts into one Supreme Court it follows that all the Judges of those Courts will become Judges of the Supreme Court; and thus *every Judge, though belonging to a particular Division, will be competent to sit in any Division* of the Court, whenever it may be found convenient for the administration of justice. This interchangeability, so to speak, of all the Judges, will lead, it may reasonably be expected, to a considerable increase in judicial power.

"From which no Judge may be appointed to the Court of Appeal." See s. 4 of the Supreme Court of Judicature Act, 1875.

The Judges are to hold office *quamdiu se bene gesserint*, s. 5 of the last-mentioned Act.

SECTION 32.—*Power to alter Divisions by Order in Council.*

Her Majesty in Council may, from time to time, upon any report or recommendation of the Council of Judges of the Supreme Court hereinafter mentioned, order that any reduction or increase in the number of Divisions of the High Court of Justice, or in the number of the Judges of the said High Court who may be attached to any such Division, may, pursuant to such report or recommendation, be carried into effect; and may give all such further directions as may be necessary or proper for that purpose; and such

Order may provide for the abolition on vacancy of the distinction of the offices of any of the following Judges, namely, the Chief Justice of England, the Master of the Rolls, the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer, which may be reduced, and of the salaries, pensions, and patronage attached to such offices, from the offices of the other Judges of the High Court of Justice, notwithstanding anything in this Act relating to the continuance of such offices, salaries, pensions, and patronage; but no such Order of Her Majesty in Council shall come into operation until the same shall have been laid before each House of Parliament for thirty days on which that House shall have sat, nor if, within such period of thirty days, an address is presented to Her Majesty by either House of Parliament, praying that the same may not come into operation. Any such Order, in respect whereof no such address shall have been presented to Her Majesty, shall, from and after the expiration of such period of thirty days, be of the same force and effect as if it had been herein expressly enacted: Provided always, that the total number of the Judges of the Supreme Court shall not be reduced or increased by any such Order.

In the passages cited from the First Report of the Judicature Commission* under the preceding section, it will

* P. 9.

be seen that it is "for the present" only that the Commissioners recommend that the existing Courts should, when they become Divisions of the Supreme Court, "retain their distinctive titles, with a view," merely, "to facilitate the transition." The same considerations evidently induced the framers of the preceding section to retain the time-honoured titles of the Lord Chief Justice of England (2), the Master of the Rolls (1), the Lord Chief Justice of the Common Pleas (3), and (4) the Lord Chief Baron of the Exchequer. The present section enables Her Majesty in Council, when the temporary purpose for which these titles, like those of the Superior Courts, were retained, has been served, to sweep away, on vacancies occurring, all distinction between these ancient and lofty titles and those of the puisne Judges; also to reduce or increase *ad libitum* the number of the Divisions of the High Court. The alteration in the number of the Divisions of the High Court can only be made by Her Majesty in Council "upon any report or recommendation of the Council of Judges;" but it would seem, from the peculiar wording of the section, that the titles, salaries, and pensions of the three Common Law Chiefs and of the Master of the Rolls can be reduced by Her Majesty in Council, *mero motu*, independently of the Council of Judges (as to which, see s. 75, *infra*).

SECTION 33.—*Rules of Court to provide for distribution of business.*

All causes and matters which may be commenced in, or which shall be transferred by this Act to, the High Court of Justice, shall be distributed among the several Divisions and Judges of the said High Court, in such manner as may from time to time be determined by any Rules of Court, or Orders of Transfer, to be made under the authority of this Act; and in the meantime, and subject thereto, all such causes and matters

shall be assigned to the said Divisions respectively, in the manner hereinafter provided. Every document by which any cause or matter may be commenced in the said High Court shall be marked with the name of the Division, or with the name of the Judge, to which or to whom the same is assigned.

“In the meantime in the manner hereinafter provided” refers to the next section. No Rules of Court have yet * been made, altering the distribution of business among the five Divisions of the High Court contained in that section. “Orders of Transfer.” See s. 36, *infra*.

In the forms given in the Appendix to the Amending Act, a space is left for the name of the Division ; in the Chancery forms, for that of the Judge, also.

SECTION 34.—*Assignment of certain business to particular Divisions of High Court subject to Rules.*

There shall be assigned (subject as aforesaid) to the Chancery Division of the said Court :

- (1.) All causes and matters pending in the Court of Chancery at the commencement of this Act :
- (2.) All causes and matters to be commenced after the commencement of this Act, under any Act of Parliament by which exclusive jurisdiction, in respect to such causes or matters, has been given to the Court of Chancery, or to any Judges or Judge

thereof respectively, except appeals from County Courts :

(3.) All causes and matters for any of the following purposes :

The administration of the estates of deceased persons ;

The dissolution of partnerships or the taking of partnership or other accounts ;

The redemption or foreclosure of mortgages ;

The raising of portions, or other charges on land ;

The sale and distribution of the proceeds of property subject to any lien or charge ;

The execution of trusts, charitable or private ;

The rectification, or setting aside, or cancellation of deeds or other written instruments ;

The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases ;

The partition or sale of real estates ;

The wardship of infants and the care of infants' estates.

There shall be assigned (subject as aforesaid) to the Queen's Bench Division of the said Court :

- (1.) All causes and matters, civil and criminal, pending in the Court of Queen's Bench at the commencement of this Act :
- (2.) All causes and matters, civil and criminal, which would have been within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction, if this Act had not passed.

There shall be assigned (subject as aforesaid) to the Common Pleas Divisions of the said Court :

- (1.) All causes and matters pending in the Court of Common Pleas at Westminster, the Court of Common Pleas at Lancaster, and the Court of Pleas at Durham, respectively, at the commencement of this Act :
- (2.) All causes and matters which would have been within the exclusive cognizance of the Court of Common Pleas at Westminster, if this Act had not passed.

There shall be assigned (subject as aforesaid) to the Exchequer Division of the said Court :

- (1.) All causes and matters pending in the Court of Exchequer at the commencement of this Act :
- (2.) All causes and matters which would have been within the exclusive cognizance of the Court of Exchequer, either as a Court of Revenue or as a Common Law Court, if this Act had not passed :

(3.) *All matters pending in the London Court of Bankruptcy at the commencement of this Act :*

(4.) *All matters to be commenced after the commencement of this Act under any Act of Parliament by which exclusive jurisdiction in respect to such matters has been given to the London Court of Bankruptcy.*

There shall be assigned (subject as aforesaid) to the Probate, Divorce, and Admiralty Division of the said High Court :

(1.) All causes and matters pending in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, at the commencement of this Act :

(2.) All causes and matters which would have been within the exclusive cognizance of the Court of Probate, or the Court for Divorce and Matrimonial Causes, or of the High Court of Admiralty, if this Act had not passed.

Section 33 of the Supreme Court of Judicature Act, 1875, and the second Schedule to that Act, repeal from "all matters pending in the London Court of Bankruptcy" to "London Court of Bankruptcy" in this section.

The substituted provisions will be found in section 9 of the Amending Act.

The present section is founded on the following passage in the First Report of the Judicature Commission :—*

Between the several Chambers or Divisions of the Supreme Court it would be necessary to make such a classification of business as might seem desirable with reference to the nature of the suits and the relief to be sought or administered therein, and the ordinary distribution of business among the different Chambers or Divisions should be regulated according to such classification. For

the same reason which induces us to recommend the retention *for the present* of the distinctive titles of the different Courts in their new character as so many Divisions of the Supreme Court, we think that such classification should *in the first instance* be made on the principle of assigning, as nearly as practicable, to those Chambers or Divisions such suits as would *now* be commenced in the respective Courts as *at present* constituted; with power, however, to the Supreme Court to vary or alter this classification in such manner as may from time to time be deemed expedient."

The concluding words of this recommendation form the foundation of the preceding section of this Act.

See the note to section 25, subsection (10), *supra*, in reference to this section.

Forms of the general indorsements of writs in matters assigned by this Act to the Chancery Division will be found in Appendix (A) to the Amending Act, Part 2, section 1, § 1-9.

See as to proceeding in default of appearance in actions assigned by this section to the Chancery Division and Probate actions, Order XIII., Rule 9, of the first Schedule in the Amending Act. *

SECTION 35.—*Option for any Plaintiff subject to Rules to choose in what Division he will sue.*

Subject to any Rules of Court, and to the provisions hereinbefore contained, and to the power of transfer, every person by whom any cause or matter may be commenced in the said High Court of Justice shall assign such cause or matter to one of the Divisions of the said High Court, not being the Probate, Divorce and Admiralty Division thereof, as he may think fit, by marking the document by which the same is commenced, with the name of such Division, and giving notice thereof to the proper officer of the Court; provided that all interlocutory and other steps and proceedings in or before the said High Court, in any cause or matter subsequent to the commencement thereof, shall be taken (subject to any Rules of Court and to the power of transfer) in the Division of the said High Court to which such cause or matter is for the time being attached; provided also, that if any plaintiff or petitioner shall at any time assign his cause or matter to any Division of the said High Court to which,

* It is greatly to be feared that the preservation of the hard-and-fast lines between the Chancery and Common Law Divisions by this section will impair the working of the Act as a remedial measure to the suitor.

According to the Rules of Court or the provisions of this Act, the same ought not to be assigned, the Court, or any Judge of such Division, upon being informed thereof, may, on a summary application, at any stage of the cause or matter, direct the same to be transferred to the Division of the said Court to which, according to such rules or provisions, the same ought to have been assigned, or he may, if he think it expedient so to do, retain the same in the Division in which the same was commenced; and all steps and proceedings whatsoever taken by the plaintiff or petitioner, or by any other party in any such cause or matter, and all orders made therein by the Court or any Judge thereof before any such transfer, shall be valid and effectual to all intents and purposes in the same manner as if the same respectively had been taken and made in the proper Division of the said Court to which such cause or matter ought to have been assigned.

This section is repealed by the Supreme Court of Judicature Act, 1875, s. 33, and the second Schedule.

The substituted provisions will be found in section 11 of the Supreme Court of Judicature Act, 1875. That section, however, re-enacts the 35th section of this Act *verbatim*, adding, at the end merely, the following additional proviso:—

“Subject to Rules of Court, a person commencing any cause or matter shall not assign the same to the Probate, Divorce, or Admiralty Division, unless he would have been entitled to commence the same in the Court of Probate or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, if this Act had not been passed.”

SECTION 36.—*Power of Transfer.*

Any cause or matter may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by such authority and in such manner as Rules of Court may direct, from one Division or Judge of the High Court of Justice to any other Division or Judge thereof, or may by the like authority be retained in the Division in which the same was commenced, although such

may not be the proper Division to which the same cause or matter ought, in the first instance, to have been assigned.

This section is founded on the following passage in the First Report of the Judicature Commission :—*

“It should, further, be competent for any Chamber or Division of the Supreme Court to order a suit to be transferred at any stage of its progress to any other Chamber or Division of the Court, if it appears that justice can thereby be more conveniently done in the suit ; but, except for the purpose of obtaining such transfer, it should not be competent for any party to object to the prosecution of any suit in the particular Chamber or Division in which it is being prosecuted, on the ground that it ought to have been brought or prosecuted in some other Chamber or Division of the Court. When such transfer has been made, the Chamber or Division, to which the suit has been so transferred, will take up the suit at the stage to which it had advanced in the first Chamber, and proceed thenceforward to dispose of it in the same manner as if it had been originally commenced in the Chamber or Division to which it was transferred.”

The “power of transfer” and “order of transfer” have been already incidentally alluded to in sections 29 and 33, *supra*.

By Order LI., Rule 1, of the first Schedule to the Supreme Court of Judicature Act, 1875, “any action or actions may be transferred from one Division to another of the High Court or from one Judge to another of the Chancery Division by an order of the Lord Chancellor, provided that no transfer shall be made from or to any Division without the consent of the President of the Division.” By Rule 2 of the same Order, “any action may, at any stage, be transferred from one Division to another by an order made by the Court or any Judge of the Division to which the action is assigned : Provided that no such transfer shall be made without the consent of the President of the Division to which the action is proposed to be transferred.”

See also section 11 of the Supreme Court of Judicature Act, 1875, subsection (2).

SECTION 37.—*Sittings in London and Middlesex and on Circuits.*

Subject to any arrangements which may be from time to time made by mutual agreement between the Judges of the said High Court, the sittings for trials by jury in London and Middlesex, and the sittings of Judges of the said High Court under Commissions of Assize, Oyer and Terminer, and Gaol Delivery, shall be held by or before Judges of the Queen's Bench, Common Pleas, or Exchequer Division of the said High Court: Provided that it shall be lawful for Her Majesty, if she shall think fit, to include in any such Commission any Ordinary Judge of the Court of Appeal or any Judge of the Chancery Division to be appointed after the commencement of this Act, or any Serjeant-at-Law, or any of Her Majesty's Counsel learned in the law, who, for the purposes of such Commission, shall have all the power, authority, and jurisdiction of a Judge of the said High Court.

See the note to s. 29, *supra*.

This section is amended by the 8th section of the Supreme Court of Judicature Act of 1875, which enacts, that "every Judge of the Probate, Divorce and Admiralty Division of the High Court of Justice, appointed after the passing of 'that' Act, shall, so far as the state of business in the said Division will admit, share with the Judges mentioned in section 37 of the Principal Act the duty of holding sittings for trials by jury in London and Middlesex; and

sittings under Commissions of Assize, Oyer and General Gaol Delivery.”

A Chancery Judge sitting on a Commission of Oyer and Terminer and General Gaol Delivery, as contemplated by this section, would afford as striking an illustration of the union of the Superior Courts as could well be conceived. There is no principle better established than that the Chancery Judges have no criminal jurisdiction.

The reader is referred to the second Appendix to the Fifth (and Final) Report of the Judicature Commission (1874) for interesting information respecting the subject-matter of this section. The Royal Warrants for adding Serjeants-at-Law and Queen’s Counsel, &c., to the various Commissions of Assize will be found at p. 49 *et seq.*

See also 13 & 14 Vict., c. 25.

SECTION 38.—*Rota of Judges for Election Petitions.*

The Judges to be placed on the rota for the trial of election petitions for England in each year, under the provisions of the “Parliamentary Elections Act, 1868,” shall be selected out of the Judges of the Queen’s Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice in such manner as may be provided by any Rules of Court to be made for that purpose; and in the meantime, and subject thereto, shall be selected out of the Judges of the said Queen’s Bench, Common Pleas, and Exchequer Divisions of the said High Court, by the Judges of such Divisions respectively, as if such Divisions had been named instead of the Courts of Queen’s Bench, Common Pleas, and Exchequer respectively in such last-mentioned Act: Provided that the

Judges who, at the commencement of this Act, shall be upon the rota for the trial of such petitions during the then current year, shall continue upon such rota until the end of such year, in the same manner as if this Act had not passed.

This is one of the transition clauses of the Act.

The Act 31 and 32 Vict., c. 125, and the General Rules of Procedure, made under s. 25 of that Act by the election Judges, will be found in the Appendix to Hardcastle on the Law and Practice of Election Petitions (1874).

The "rota" for each year is to be settled "on the third day of Michaelmas Term." By Rule 1 of the sixty-first Order of the first Schedule to the Supreme Court of Judicature Act, 1875, "The Michaelmas sittings shall commence on the 2nd of November," *i.e.*, the first day of the old Michaelmas Term. Judges who are members of the House of Lords * are excluded from the rota. Each of the three Common Law Courts nominates a puisne Judge to be placed upon the rota, the chief of the Court having a second or casting vote, in case the Court is divided

SECTION 39.—*Powers of one or more Judges not constituting a Divisional Court.*

Any Judge of the said High Court of Justice may, subject to any Rules of Court, exercise in Court or in Chambers all or any part of the jurisdiction by this Act vested in the said High Court, in all such causes and matters, and in all such proceedings in any causes or matters, as before the passing of this Act might have been heard in Court or in Chambers respectively, by a single Judge of any of the Courts whose jurisdiction is

* Lord Coleridge is the only Judge who is a member of the House of Lords, and he is not a puisne Judge.

hereby transferred to the said High Court, or as may be directed or authorised to be so heard by any Rules of Court to be hereafter made. In all such cases, any Judge sitting in Court shall be deemed to constitute a Court.

This is, to some extent, one of the transition clauses of the Act. One effect of it will be this. In the Court of Chancery, and in the Court of Admiralty, the business will, as it always has been, conducted before a single Judge.* The words "or as may be directed or authorised to be so heard by any Rules of Court to be hereafter made," afford a loophole for considerable economy of Judge power. They are founded on the following passage in the First Report of the Judicature Commission :—†

"With a Court of Appeal such as we propose to recommend, common to all the Divisions of the Supreme Court, constantly sitting, and easy of access, we think that matters of great importance may properly, as now in the Court of Chancery, be intrusted to the jurisdiction in the first instance of a single Judge; but, having regard to the principles which have guided us in our previous recommendations, and to the importance of avoiding any too violent transition from the modes of conducting judicial business to which the public have been accustomed, and in which they may be presumed to place confidence, we think it will be advisable to authorise a single Judge to exercise the jurisdiction of the Supreme Court, in the despatch of all such business appropriated to the Divisions of the Queen's Bench, Common Pleas, and Exchequer respectively, as by general orders, or by the special order of the Court, or the consent of the parties, may be remitted to him."

As this is the first section which deals with the *number* of Judges competent to form a "Court," it may not be out of place to cite here the short epitome of the question, as it stands, given by the Judicature Commission :—†

* Per Lord Selborne, C., Hansard's Parliamentary Debates, New Series, vol. 214, p. 345, and see s. 42, *infra*.

† P. 10 of their First Report.

“Here arises an important and difficult question, as to the number of Judges who should ordinarily sit in each Chamber or Division of the Supreme Court. Hitherto the constitution of the Court of Chancery and of the Courts of Common Law, in this respect, has been entirely different. Each Division of the Court of Chancery is presided over by a single Judge, who adjudicates on all matters as a Court of First Instance, except in the few cases when he sits as a Court of Appeal from the County Courts. In like manner, a single Judge administers justice in the Courts of Probate, Divorce, and Admiralty respectively. On the other hand, in the Sittings of the Courts of Common Law in banco, the Court is ordinarily constituted of four Judges. The matters adjudicated upon by the single Judge in the Court of Chancery are in many instances as important as the business transacted before the four Judges in the Courts of Common Law; so that there would seem to be either a want of power in the Court of Chancery, or an excess of power in the Courts of Common Law; but it must be borne in mind that a considerable proportion of the business of the Courts of Common Law is transacted by one of the Judges sitting at Chambers; much of the business of these Courts also consists of the review of trials which have taken place before a Judge and Jury; they also review the decisions of the Judge sitting at Chambers; they are also empowered to decide various important matters, some of which involve questions of general public interest, on which their determination is in some cases final.”

Mr. Justice Lush, in his “Practice of the Superior Courts of Law,”* defines in very wide terms the jurisdiction of a Judge at Chambers. “The Common Law,” he says, “appears to vest in a single Judge the same equitable jurisdiction over the proceedings of a cause, which it vests in the Court of which he is a constituent member. His act is potentially the act of the Court, for although he cannot directly enforce the orders he makes, or exercise what may be termed the prerogative powers of the Court, yet the Court will adopt his orders, and for disobedience

* Book II., c. XVII.

thereto, when so adopted, will issue process of attachment, as if the matter had been originally ordered by the Court itself.”*

Two remarkable statutes, 11 Geo. IV. and 1 William IV., c. 70,† and 1 and 2 Vict., c. 45,‡ seem to have forestalled, to some extent, the spirit of the proviso contained in the next section :—“ Every Judge of the High Court shall be qualified and empowered to sit in any such Divisional Courts.” By virtue of these enactments “ it may,” says Mr. Justice Lush, “ be laid down, that, of whichever Court, a Judge of either of the Superior Courts [of Common Law] is Judge, he possesses the same jurisdiction as he would have had if he were a Judge of the Court to which the matter in question belongs ; so that for the purpose of transacting *anywhere out of Court* all such business, as by the course and practice of the Court to which such business belongs, may be transacted by a single Judge, every Judge of the Superior Courts of Common Law may be said to *represent all the three Courts.*”

Where an Act gives new powers to one of the Superior Courts of Common Law in general terms, these powers may be exercised by a Judge at Chambers,§ unless they are in express terms confined to “ the Court ” alone. ||

It is competent for the Superior Courts of Common Law to grant a rule *nisi* returnable at Chambers, with respect to such matters as belong to them by Common Law.¶ It is now clearly established that a Judge at Chambers has the same power to award costs as the Court would have had in the same case.**

SECTION 40.—*Divisional Courts of the High Court of Justice.*

Such causes and matters as are not proper to

* See *Rex v. Falkner*, 2 C. M. and R., 525.

† S. 4. ‡ S. 1.

§ *Smeeten v. Collier*, 1 Ex., 457.

|| See, e.g., *Jones v. Fitzaddam*, 1 C. & M., 855.

¶ *Casse v. Wright*, 14 C. B., 562.

** *Bridge v. Wright*, 2 Ad. & El., 48; *Hughes v. Brand*, 2 D. P. C., 131; *Clement v. Weaver*, 3 M. & G., 551.

be heard by a single Judge shall be heard by Divisional Courts of the said High Court of Justice, which shall for that purpose exercise all or any part of the jurisdiction of the said High Court. Any number of such Divisional Courts may sit at the same time. A Divisional Court of the said High Court of Justice shall be constituted by two or three, and no more of the Judges thereof; and, except when through pressure of business or any other cause it may not conveniently be found practicable, shall be composed of three such Judges. Every Judge of the said High Court shall be qualified and empowered to sit in any of such Divisional Courts. The President of every such Divisional Court of the High Court of Justice shall be the senior Judge of those present, according to the order of their precedence under this Act.

The provision that a Divisional Court shall not be constituted of more than 3 Judges is intended to remedy the waste of Judge power, which so frequently occurred during sittings in banco at Westminster Hall. It is founded on the recommendation of the Judicature Commissioners, who, in their First Report, suggested that "all matters now disposed of in banco by the Courts of Queen's Bench, Common Pleas, and Exchequer, shall be heard and determined by not more than three Judges."

The expression, "Divisional Court," used in these and several other sections of the Act, is not a particularly happy one. Confusion is apt to arise in the mind of the reader between *the Divisions* of the High Court of Justice and *the Divisional Courts* of the High Courts of Justice; but they are quite distinct. The Divisions of the High Court of Justice, five in number, have already been defined

by s. 31, *supra*. That the "Divisional Courts" are meant to be distinct from these "Divisions" is evident from the language of Lord Selborne, C., when introducing the present measure:—* "You would, if necessary, be able to have *seven* Divisional Courts sitting contemporaneously." "Power will be given to have such Divisional Courts, whenever it is thought desirable, *in* the second or Chancery Division." A further confusion of thought arises from the fact that the present section speaks of "Divisional Courts of the High Court of Justice;" s. 41 speaks of "Divisional Courts of the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court," and s. 43 speaks of "Divisional Courts of the Court of Chancery."

SECTION. 41.—*Divisional Courts for business of Queen's Bench, Common Pleas, and Exchequer Divisions.*

Subject to any Rules of Court, and in the meantime until such Rules shall be made, all business belonging to the Queen's Bench, Common Pleas, and Exchequer Divisions respectively of the said High Court, which, according to the practice now existing in the Superior Courts of Common Law, would have been proper to be transacted or disposed of by the Court sitting in banco if this Act had not passed, may be transacted and disposed of by Divisional Courts, which shall, as far as may be found practicable and convenient, include one or more Judge or Judges attached to

* Hansard's Parliamentary Debates, New Series, vol. 214, p. 345.

the particular Division of the said Court to which the cause or matter out of which such business arises has been assigned; and it shall be the duty of every Judge of such last-mentioned Division, and also of every other Judge of the High Court who shall not for the time being be occupied in the transaction of any business specially assigned to him, or in the business of any other Divisional Court, to take part, if required, in the sittings of such Divisional Courts as may from time to time be necessary for the transaction of the business assigned to the said Queen's Bench, Common Pleas, and Exchequer Divisions respectively; and all such arrangements as may be necessary or proper for that purpose, or for constituting or holding any Divisional Courts of the said High Court of Justice for any other purpose authorised by this Act, and also for the proper transaction of that part of the business of the said Queen's Bench, Common Pleas, and Exchequer Divisions respectively, which ought to be transacted by one or more Judges not sitting in a Divisional Court, shall be made from time to time under the direction and superintendence of the Judges of the said High Court; and in case of difference among them, in such manner as a majority of the said Judges, with the concurrence of the Lord Chief Justice of England shall determine.

This section seems designed to carry out the following

recommendation of the Judicature Commission :* “ We also think that the Judges of each Division or Chamber in which there are several Judges should have power to sit in banco in two sub-divisions at the same time, with the assistance, whenever necessary, of a Judge or Judges from any other Division of the Court.” The scheme contained in the present section appears to be a more elastic one than that suggested by the Judicature Commission in the above paragraph. There is to be no stereotyped number of “ Divisional Courts ” for the transaction of the business that would, under the old system, have been transacted by the Queen’s Bench, Common Pleas, and Exchequer, respectively sitting in banco. Under the recommendation of the Judicature Commission there would be six, two for each Chamber. Again, the Divisional Courts to be formed under this section may consist entirely of Judges of the two Chambers to which the cause and matter out of which the business arises has *not* been assigned ; which would have been impossible if the recommendation of the Judicature Commission had been literally carried out. The section again provides that each Divisional Court shall, “ as far as may be found practicable and convenient,” include one or more Judges attached to the particular Division (or Chamber) to which the cause or matter has been assigned.” The Judicature Commission recommend that the Divisional Court, consisting of Judges of the Chamber to which the cause or matter has been assigned, should “ have the assistance, whenever necessary, of a Judge or Judges of *any other* Division of the Court.” Under the present section the Divisional Court would consist of Judges of any of the three Common Law Divisions (or Chambers), supplemented, if practicable, by a Judge of the Division (or Chamber) to which the cause or matter was assigned. Under the recommendation of the Judicature Commission the Divisional Court would consist of Judges of the Division (or Chamber) to which the cause or matter was assigned, supplemented, if necessary, by a Judge of any of the other two Common Law Divisions (or Chambers).

* P. 10 of their First Report.

SECTION 42.—*Distribution of business among the Judges of the Chancery and Probate, Divorce, and Admiralty Divisions of the High Court.*

Subject to any Rules of Court, and in the meantime until such Rules shall be made, all business arising out of any cause or matter assigned to the Chancery or Probate, Divorce, and Admiralty Division of the said High Court, shall be transacted and disposed of in the first instance by one Judge only, as has been heretofore accustomed in the Court of Chancery, the Court of Probate and for Divorce and Matrimonial Causes, and the High Court of Admiralty respectively; and every cause or matter which, at the commencement of this Act, may be depending in the Court of Chancery, the Court of Probate and for Divorce and Matrimonial Causes, and the High Court of Admiralty respectively, shall (subject to the power of transfer) be assigned to the same Judge in or to whose Court the same may have been depending or attached at the commencement of this Act; and every cause or matter which after the commencement of this Act may be commenced in the Chancery Division of the said High Court, shall be assigned to one of the Judges thereof, by marking the same with the name of such of the said Judges as the plaintiff or petitioner (subject to the power of transfer) may in his option think fit: Provided

that (subject to any Rules of Court, and to the power of transfer, and to the provisions of this Act as to trial of questions or issues by Commissioners, or in Middlesex or London) all causes and matters which, if this Act had not passed, would have been within the exclusive cognizance of the High Court of Admiralty, shall be assigned to the present Judge of the said Admiralty Court during his continuance in office as a Judge of the High Court.

This is, to some extent, one of the transition clauses of this Act.

See the next section and s. 44 as to the holding of Divisional Courts for the transaction of Chancery, Admiralty, Probate, and Divorce business. "Each Division of the Court of Chancery is presided over by a single Judge, who adjudicates on all matters as a Court of First Instance. In like manner, a single Judge administers justice in the Courts of Probate, Divorce and Admiralty respectively." First Report of the Judicature Commission, p. 10.

As to the "power of transfer," see s. 36, *supra*.

As to "the provision of this Act as to trial of questions or issues by Commissioners, or in Middlesex or London," see s. 30, *supra*, and the notes appended thereto.

As to "causes and matters in the Court of Admiralty," see s. 34, *supra*.

As to "the present Judge of the Court of Admiralty," and the provisions for his "continuance in office," see s. 8 of the Supreme Court of Judicature Act, 1875.

SECTION 43.—*Divisional Courts for business of the Chancery Division.*

Divisional Courts may be held for the transaction of any part of the business assigned

to the said Chancery Division, which the Judge, to whom such business is assigned, with the concurrence of the President of the same Division, deems proper to be heard by a Divisional Court.

By the preceding section all business in the Chancery Division is to be assigned in the first instance to a single Judge. The Lord Chancellor is (s. 31, *supra*) "the President" of the Chancery Division of the High Court.

SECTION 44.—*Divisional Courts for business belonging to the Division.*

Divisional Courts may be held for the transaction of any part of the business assigned to the Probate, Divorce, and Admiralty Division of the said High Court, which the Judges of such Division, with the concurrence of the President of the said High Court, deem proper to be heard by a Divisional Court. Any cause or matter assigned to the said Probate, Divorce, and Admiralty Division may be heard at the request of the President of such Division, with the concurrence of the President of the said High Court, by any other Judge of the said High Court.

"A single Judge administers justice in the Courts of Probate, Divorce, and Admiralty respectively." First Report of the Judicature Commission, p. 10.

By s. 31, *supra*, "the existing Judge of the Court of Probate shall be the President of the Probate, Divorce, and Admiralty Division (unless appointed an ordinary Judge of the Court of Appeal), and subject thereto,

the senior Judge of the said Division, according to the order of precedence under this Act, shall be President."

The "President of the High Court" is, presumably, the Lord Chancellor, but by s. 3 of the Supreme Court of Judicature Act, 1875, it is stated that "the Lord Chancellor shall not be deemed a permanent Judge of the High Court." "In the absence of the Lord Chancellor, the Lord Chief Justice of England" will (s. 5, *supra*) be "the President" of the High Court.

SECTION 45.—*Appeals from Inferior Courts to be determined by Divisional Courts.*

All appeals from Petty or Quarter Sessions, from a County Court, or from any other inferior Court, which might before the passing of this Act have been brought to any Court or Judge whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by Divisional Courts of the said High Court of Justice, consisting respectively of such of the Judges thereof as may from time to time be assigned for that purpose, pursuant to Rules of Court, or (subject to Rules of Court) as may be so assigned according to arrangements made for the purpose by the Judges of the said High Court. The determination of such appeals respectively by such Divisional Courts shall be final, unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior Court shall have been heard.

By 20 and 21 Vic., c. 45, an appeal is given from the

decision of any information or complaint in a summary way, by any Justice or Justices, alleged to be wrong in point of law, to one of the Superior Courts of Law to be named by the party appealing, and the Justice or Justices may be compelled to state a case.

After judgment given against a defendant at Sessions, if the indictment be bad in substance, or the judgment be erroneous, or any other defect in substance appear upon the face of the record, the defendant may have the judgment reversed by a writ of error issuing from the Common Law side of the Court of Chancery, or Petty Bag. The judgment must have been upon an indictment, for no writ of error will lie upon a mere summary conviction.* The writ of error lies from all inferior criminal jurisdictions to the Queen's Bench.† There seem to be two modes of proceeding, either of which the defendant may adopt at his option; he may bring the writ of error directed to the justices, and have the record returned to the Court of Queen's Bench under and by virtue of it; or he may have the record removed into the Court of Queen's Bench by certiorari, and then bring a writ of error *coram nobis*.‡

The writ of certiorari is a writ issuing from the civil side of the Court of Queen's Bench, directed to the justices at sessions, justices of the peace, or the judges of inferior Courts, requiring them to certify to that Court some indictment, conviction, order of sessions, order of justices, or other matter of a judicial nature depending before them, in order that the same may be disposed of as the Court of Queen's Bench shall think fit.§

When the justices at sessions are by law made judges of facts as well as of law, as in appeals to them, their decision is final, and cannot be reversed by any Court whatever without their consent. If, however, they feel a difficulty in the application of the law to facts in any particular case, they may put those facts in the form of a special case for the opinion of the Court of Queen's Bench, and confirm or

* *Anon.* Vent., 33; *Anon.* Id., 171; *Barry's Case*, 2 Jo., 167; Vin.

Abr., Error, D.; 2 Bac. Abr., Error, A.

† Steph. Comm., Book VI., c. 24, p. 463; 7th Edn.

‡ *Rex v. Foxby*, 1 Salk., 266; 3 Com. Dig., Error, B.

§ Archbold's Quarter Sessions, 3rd Edn., p. 45.

quash the order or conviction before them, subject to such opinion; and the Court of Queen's Bench will confirm or quash the order of sessions and the order or conviction appealed against, according as they are warranted by the facts stated.

The Court of Queen's Bench by writ of mandamus can call upon justices in sessions to do some act, which they refuse to do, but which by law they ought to do, in reference to a case before them.* It is to be observed that by s. 34, *supra*, there shall be assigned to the Queen's Bench Division of the High Court of Justice, all criminal matters which would have been within the exclusive jurisdiction of the Court of Queen's Bench, *in the exercise of its original jurisdiction*, if this Act had not passed. "Original" is probably used in contradistinction to appellate jurisdiction. The decision of appeals from inferior Courts of criminal jurisdiction appears to be vested in Divisional Courts of the High Court of Justice. The practice and procedure of these Divisional Courts would, however, by s. 19 of the Supreme Court of Judicature Act, 1875, be the same as that of the Court of Queen's Bench in similar criminal matters.

By s. 16 of the Statute 13 and 14 Vict., c. 61, an appeal is given in Common Law cases from the County Courts (when the debt or damage is above £20 and under £50), "to any of the superior Courts of Common Law at Westminster, two or more of the puisne Judges whereof shall sit out of term as a Court of Appeal for that purpose." (See *East Anglian Railway Company v. Lythgoe*, 2 L. M. and P., 221; *Jonas v. Adams*, 20 L. J. (Q. B.), 397).

By s. 18 of the Statute 28 and 29 Vict., c. 99, an appeal is given in Equity cases from the County Courts to a Vice-Chancellor.

By s. 26 of the Statute 31 and 32 Vict., c. 71, an appeal is given in Admiralty cases from the County Court to the High Court of Admiralty.

By s. 58 of the Statute 20 and 21 Vic., c. 77, an appeal is given from the County Court in testamentary matters to the Court of Probate.

* See as to special cases and mandamus, Archbold's Quarter Sessions pp. 60-81, 3rd edition.

By s. 71 of the Statute 32 and 33 Vict., c. 71, an appeal is given from the County Court in Bankruptcy cases to the Chief Judge in Bankruptcy,* and from him, again, to the Court of Appeal in Chancery.

This brief statement of the diversity of appeal will illustrate the extremely beneficial character of the present enactment in establishing one appellate tribunal for County Courts in the High Court of Justice.

By s. 15 of the Supreme Court of Judicature Act, 1875, it is provided that "it shall be lawful for Her Majesty from time to time, by Order in Council, to direct that the enactments relating to appeals from county courts shall apply to any other inferior court of record; and those enactments, subject to any exceptions, conditions, and limitations contained in the order, shall apply accordingly, as from the date mentioned in the order."

From Borough and other Local Courts of Record error generally lies to the Queen's Bench.†

See, further, as to the inferior Courts and their Jurisdiction, part VI of this Act (including ss. 88, 89, 90, and 91), *infra*.

SECTION 46.—*Cases and points may be reserved for or directed to be argued before Divisional Courts.*

Subject to any Rules of Court, any Judge of the said High Court, sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court, may reserve any case, or any point in a case, for the consideration of a Divisional Court, or may direct any case, or point in a case, to be argued before a Divisional Court, and any Divisional Court of the said High Court shall have power to hear and determine any such

* The last-mentioned appeal will, of course, under ss. 9 and 18, still go to the Chief Judge in Bankruptcy, but from him to the new Court of Appeal.

† Steph. Comm., B. IV., c. IV., p. 295 (Edn., 1874). 3 Black. Comm., 411; 1 Roll Abr., 745; Carter, 222.

case or point so reserved or so directed to be argued.

By section 22 of the Supreme Court of Judicature Act, 1875, this section is thus qualified: "Whereas, by section 46 of the principal Act, it is enacted, that 'any Judge of the said High Court sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court may reserve any case, or any point in a case, for the consideration of a Divisional Court, or may direct any case or point in a case to be argued before a Divisional Court:?' Be it hereby enacted, that nothing in the said Act, nor in any rule or order made under the powers thereof or of this Act, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the Judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues. Provided also, that the said right may be enforced either by motion in the High Court of Justice or by motion in the Court of Appeal founded upon an exception entered upon or annexed to the record."*

This qualification was inserted at the instance of Mr. Watkin Williams, Q.C., in Committee on the Bill in the House of Commons, as an amendment to section 21, with a view to making it clear that the words "may reserve any case," in section 46, were not intended to interfere with trial by jury. It seems, however, pretty clear that that section has reference exclusively to questions of law, and that its object is to give a Judge power to reserve such questions for a Divisional Court, instead of the full Court in Banco: *vide* s. 41, *supra*.†

Lord Selborne, C., when introducing the present measure said:—"It is proposed to *retain trial by jury in all cases where it now exists*, except in one particular." This he explained to be the reference of cases of account, whether

* The following statutes were referred to in the margin, but do not appear in the margin of the new Act:—13 Ed. 1, st. 1, c. 31; 3 & 4 Vict., c. 65., s. 15; 15 & 16 Vict., c. 76. s. 184; 20 & 21 Vict., c. 85, s. 39; 22 & 23 Vict., c. 21; 23 & 24 Vict., c. 144, s. 1.

† The amendment has been severed in the Lords from the context, and now appears as a separate section (s. 22).

the parties consent or not, to official referees. "The proposal of the Bill is that they shall determine all questions of fact or account, leaving questions of law to be determined by the Divisional Courts."*

SECTION 47.—*Provision for Crown cases reserved.*

The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the Justices of either Bench and the Barons of the Exchequer by the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter seventy-eight, intituled, "An Act for the further amendment of the administration of the Criminal Law," or any Act amending the same, shall and may be exercised after the commencement of this Act by the Judges of the High Court of Justice, or five of them at the least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such chiefs at least, shall be part. The determination of any such question by the Judges of the said High Court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said Judges

* Hansard's Parliamentary Debates, New Series, vol. 214, p. 346.

under the said Act of the eleventh and twelfth years of Her Majesty's reign.

By s. 100, *supra*, "Crown cases reserved" shall mean such questions of law reserved in criminal trials as are mentioned in the Act 11 and 12 Vict., c. 78. By s. 1 of that Act it is provided as follows:—

"When any person shall have been convicted of any treason, felony, or misdemeanour before any Court of Oyer and Terminer or Gaol Delivery, or Court of Quarter Sessions, the Judge or Commissioner, or Justices of the Peace before whom the case shall have been tried may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the Justices of either Bench and Barons of the Exchequer; and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided, as he or they may think fit."

By s. 3 of the same Act, it is enacted:—

"That the jurisdiction and authorities by this Act given to the said Justices of either Bench, and Barons of the Exchequer, shall and may be exercised by the said Justices and Barons, or five of them at the least, of whom the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, or one of such chiefs at least, shall be part, being met in the Exchequer Chamber or other convenient place; and the judgment or judgments of the said Justices and Barons shall be delivered in open Court, after hearing Counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the Superior Courts of Common Law at Westminster or Dublin, as the case may be, are now delivered."

It will be perceived that the present section practically re-enacts the provisions of the 3rd section of the 11 and 12 Vict., c. 78, as to the quorum of Judges, "the Judges of the High Court of Justice" being merely substituted

for "the Justices of either Bench and Barons of the Exchequer."

"Save for some error of law apparent upon the record." Where, on a judgment of the High Court of Justice in a criminal cause or matter, there is some error of law apparent upon the record, on which the question shall have been reserved under 11 and 12 Vict., c. 78, an appeal lies, under ss. 18 and 19 and this section to the new Court of Appeal, in substitution for the old Appeal under the 1 William IV., c. 70, s. 8, to the Court of Exchequer Chamber.

SECTION 48.—*Motions for new trials to be heard by Divisional Courts.*

Every motion for a new trial of any cause or matter on which a verdict has been found by a jury, or by a Judge without a jury, and every motion in arrest of judgment, or to enter judgment non obstante veredicto, or to enter a verdict for plaintiff or defendant, or to enter a nonsuit, or to reduce damages, shall be heard before a Divisional Court; and no appeal shall lie from any judgment founded upon and applying any verdict, unless a motion has been made or other proceeding taken before a Divisional Court to set aside or reverse such verdict, or the judgment, if any, founded thereon, in which case an appeal shall lie to the Court of Appeal from the decision of the Divisional Court upon such motion or other proceeding.

This section is repealed by the Supreme Court of Judicature Act, 1875, s. 33, and the second Schedule.

The provisions of that Act with regard to new trials will be found in Order XXXIX of the first Schedule. (Rule 3 of that Order is substantially a re-enactment of Rule 48 of the Schedule to this Act.)

SECTION 49.—*What orders shall not be subject to Appeal.*

No order made by the High Court of Justice or any Judge thereof, by the consent of parties, or as to costs only which by law are left to the

discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order.

As to orders made by a Judge at Chambers by consent of the parties, Mr. Justice Lush observes :—" If the party called on to show cause at Judges' Chambers give his consent to the summons, the order may be drawn up as of course, unless it be for a writ of trial or a pleading of several matters, when the matter must be submitted to a Judge. So if the parties agree that costs of Counsel shall be allowed, it must be submitted to him for his certificate. By consenting, the party precludes himself from afterwards appealing against or questioning the validity of the order. Thus, when a summons to plead several matters was consented to, the plaintiff was holden to have debarred himself from moving to strike out one of the pleas, as being in contravention of the pleading rules.* If the order purports to be by consent and no act remains to be done by authority of the Court, the Court cannot interfere, even though the order be incorrectly drawn up; an application must first be made to the Judge to amend it.†

Where a Judge makes an order at Chambers, and, exercising a discretionary power, gives costs as prayed in the summons, but annexes a condition thereto, the Court will not interfere to remove the condition, even though the order has not been drawn up. *Bartlett v. Staton*, L. R., 1 C. P., 483.

By Reg. Gen., Trin. T. 1853, " In no case shall error be brought for any error in a judgment with respect to costs; but the error may be amended by the Court in which such judgment may have been given, on the application of either party."

By the 47th Rule in the Schedule to this Act it was provided that " the costs of and incident to all proceedings in the High Court " shall " be in the discretion of the Court." This Rule is repealed by the Amending Act, but

* *Howen v. Carr*, 5 D. P. C., 305; Lush's Practice, 3rd Ed., p. 953.

† *Hall v. West*, 1 D. and L., 412; Lush's Practice, 3rd Ed., p. 954.

it is re-enacted in the first Schedule to that Act, Order LV. On the motion of Mr. Watkin Williams, however, trials by jury were, in Committee on the Bill, excepted from the operation of this Rule; and therefore the scope of the present section is correspondingly narrowed.

SECTION 50.—*As to discharging orders made in Chambers.*

Every order made by a Judge of the said High Court in Chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged upon notice by any Divisional Court, or by the Judge sitting in Court, according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned; and no appeal shall lie from any such order to set aside or discharge which no such motion has been made, unless by special leave of the Judge by whom such order was made, or of the Court of Appeal.

Is the word “notice” a typographical error for “motion?” The word “such” appears to be meaningless, otherwise.

“If an order has been refused by a Judge at Chambers, it is irregular to make the same application to another Judge;* and the latter will not knowingly entertain an application which has thus been already disposed of. The proper course is to apply to the Court.† So, to rescind and vary an order, the motion must be made to the same Judge or to the Court. The order need not be made a Rule of Court, preparatory to moving; if it be, the motion should

* *Wright v. Stevenson*, 5 Taunt., 850.

† *Pike v. Davis*, 6. M & W., 546

be to rescind the rule ; in other cases it should be to rescind the Order.*

By the Interpleader Act, 11 and 12 Wm. IV., c. 58, "every order to be made by a single Judge not sitting in open Court, shall be liable to be rescinded or altered by the Court in like manner as other orders made by a single Judge."

By section 4 of the Common Law Procedure Act, 1860 (23 and 24 Vict., c. 126), any order made by a Judge upon an application for relief against forfeitures for breach of a covenant, or condition to insure against loss or danger by fire, shall be subject to an appeal to the Court, and may be discharged, varied, and set aside by the Court upon such terms as the Court shall think fit, upon application made thereto by any party dissatisfied with such order. No appeal lies from a Judge at Chambers when the matter is by statute left entirely in his discretion. (*Burman v. Howard*, L. J. 25 (Ex.) 289.)

The Courts are always reluctant to interfere with the discretion exercised by a Judge at Chambers ; and they will never now reverse his decision, unless it clearly appears that he acted on a wrong principle.† As regards interrogatories, the Courts are in the habit of assuming that the Judge at Chambers, in allowing and disallowing interrogatories, has used his discretion with reference to the particular circumstances of the case, and an appeal is generally fruitless.‡

The words, "such discretion as aforesaid," would appear, however, to relate only to the discretion mentioned in the previous section, *i.e.*, "as to costs, which by law are left to the discretion of the Court." See notes to that section.

When the rule *nisi* to rescind the order of a Judge is discharged, it is usual to discharge it with costs, unless the point raised is new and difficult.§

With reference to the last part of this section, Order LIV.,

* Lush's Practice, 3rd. edn., pp. 954-5.

† See *Edmunds v. Greenwood*, L. R., 4 C. P., 90 ; *Villeboisnet v. Tobin*, id., 184 ; *Morris v. Bethel*, id., 765 ; and *Iman v. Jenkins*, L. R., 5 C. P., 738.

‡ Day's Common Law Pro. Acts, p. 308, 4th ed., citing L. R. 4 C. P., 184, 190, 191.

§ *Hawkins v. Carr*, L. R., 1 Q. B., 89.

Rule 6, of the first Schedule to the Supreme Court of Judicature Act, 1875, provides that in the Q.B., C.P., and Ex. Divisions *every appeal* to the Court from any decision at Chambers shall be *by motion*.*

SECTION 51.—*Provision for absence or vacancy in the office of a Judge.*

Upon the request of the Lord Chancellor shall be lawful for any Judge of the Court of Appeal, who may consent so to do, to sit and act as a Judge of the said High Court, or to perform any other official or ministerial acts for or on behalf of any Judge absent from illness or any other cause, or in the place of any Judge whose office has become vacant, or as an additional Judge of any Division; and while so sitting and acting any such Judge of the Court of Appeal shall have all the power and authority of a Judge of the said High Court.

Under s. 4 of the Supreme Court of Judicature Act, 1875, as amended on the Report in the House of Commons, the Common Law and Probate and Divorce and Admiralty Judges may be requested to attend the sittings of the Court of Appeal. This section, therefore, is a pleasing illustration of the principle of reciprocity.

SECTION 52.—*Power of a single Judge in Court of Appeal.*

In any cause or matter pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by a single Judge of the

* And shall be made within 8 days after the decision appealed from.

Court of Appeal; and a single Judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit; but every such order made by a single Judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof.

The application to the Judge of the Court of Appeal is to be *by motion*, pursuant to Order LIII. of the first Schedule to the Supreme Court of Judicature Act, 1875.* The Judge has power (*inter alia*) to alter the order of the cause in the list of appeals (Order LVIII., Rule 8); to order the whole or any part of the evidence in the Court below to be printed, and to relieve any party printing such evidence without such order from the costs thereof, to which he would otherwise be subject (Order LVIII., Rule 12). "Or a Divisional Court thereof." See s. 12 of the Amending Act.

SECTION 53.—*Divisional Courts of Court of Appeal.*

Every appeal to the Court of Appeal shall be heard or determined either by the whole Court or by a Divisional Court consisting of any number, not less than three, of the Judges thereof. Any number of such Divisional Courts may sit at the same time. Any appeal which for any reason may be deemed fit to be re-argued before decision, or to be re-heard before final judgment, may be so re-argued or re-heard before a greater number of Judges if the Court of Appeal think fit so to direct.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule.

The reason of this repeal is obvious. The Court of Appeal to which the present section was originally applicable was a large body, out of which Divisional Courts might easily have been formed. The intermediate Court

* Order LVIII., Rule 18, of the first Schedule to the Supreme Court of Judicature Act, 1875.

of Appeal, defined by s. 4 of the Amending Act, is a smaller body—the ordinary Judges being only three in number, the minimum number fixed by this section for a Divisional Court of the Court of Appeal. See, however, s. 12 of the Amending Act.

SECTION 54.—*Judges not to sit on Appeal from their own Judgment.*

No Judge of the said Court of Appeal shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself, or made by any Divisional Court of the High Court of which he was himself a member.

This section is repealed by section 4 of the Supreme Court of Judicature Act, 1875. It is re-enacted, however, by that section, with the substitution of the words, “was and is a member” for “was himself a member,” so as to adapt it to the constitution of the new Court of Appeal, which includes additional Judges exercising original jurisdiction in the High Court of Justice. The alteration was inserted on the Report in the House of Commons at the instance of Sir Henry James, Q.C.

SECTION 55.—*Arrangements for business of Court of Appeal, and for hearing Appeals transferred from the Judicial Committee of the Privy Council.*

All such arrangements as may be necessary or proper for the transaction of the business from time to time pending before the Court of Appeal, and for constituting and holding Divisional Courts thereof, shall be made by and under the direction of the President and the other ex-officio and ordinary Judges of the said Court of Appeal; and if Her Majesty shall be pleased by Order in Council to direct that the hearing of such appeals and petitions to Her Majesty in Council as hereinbefore mentioned shall be referred to the said Court of Appeal, not less than one Divisional Court of the said Court of Appeal shall sit throughout the year (except during vacations) for the hearing of such of the appeals and petitions so referred as may from time to time be depending and ready for hearing, which Divisional Court shall be composed (as far as may be found practicable) of Judges of the Court of Appeal, who

are also members of Her Majesty's Privy Council; and any member of Her Majesty's Privy Council who, having held the office of Judge in the East Indies, or in any of Her Majesty's dominions beyond the seas, shall have been appointed by Her Majesty, under the Acts relating to the Judicial Committee of the Privy Council, to attend the sittings of the said Judicial Committee, may attend the sittings of any such Divisional Court of the Court of Appeal; and with respect to the place of sitting of any such last-mentioned Divisional Court, and any attendance or service therein, or in aid of the proceedings thereof, which may be required from the Registrar or any other officer of Her Majesty's Privy Council, all such arrangements as may be necessary or proper shall be made by the Lord Chancellor, as President of the Court of Appeal, with the concurrence of the President for the time being of Her Majesty's Privy Council; and the President of Her Majesty's Privy Council shall from time to time give such directions to the Registrar and other officers of the said Privy Council as may be necessary or proper for the purpose of carrying such last-mentioned arrangements into effect.

The operation of this section is suspended, like that of the 21st, which is in *pari materiâ*, until the first day of November, 1876, by the second section of the Supreme Court of Judicature Act, 1875.

PART IV.

TRIAL AND PROCEDURE.

SECTION 56.—*References and Assessors.*

Subject to any Rules of Court and to such right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal, may be referred by the Court or by any Divisional Court or Judge before whom such cause or matter may be pending, for inquiry and report to any official or special Referee, and the report of any

such Referee may be adopted wholly or partially by the Court, and may (if so adopted) be enforced as a judgment by the Court. The High Court or the Court of Appeal may also, in any such cause or matter as aforesaid in which it may think it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors. The remuneration, if any, to be paid to such special Referees or assessors shall be determined by the Court.

This and the three following sections and s. 83, *infra*, relate to the same subject matter—the reference of questions and of actions to official and special Referees.

They are founded on the following recommendations of the Judicature Commissioners :—

“ It seems to us that it is the duty of the country to provide tribunals adapted to the trial of all classes of cases, and capable of adjusting the rights of litigant parties in the manner most suitable to the nature of the questions to be tried.

“ We therefore recommend that great discretion should be given to the Supreme Court, as to the mode of trial, and that any questions to be tried should be capable of being tried in any Division of the Court

“ (1) by a Judge :

“ (2) by a Jury :

“ (3) by a Referee.

“ The plaintiff should be at liberty to give notice of trial by any one of these modes which he may prefer, subject to the right of the defendant to move the Judge to appoint any other mode. When the trial is to be by a Jury or by Referee, a Judge, on application by either party, if he think the questions to be tried are not sufficiently ascertained upon the pleadings, should have power to order that issues be prepared by the parties, and if necessary settled

by himself. The Judge should also, on the application of either party, have power to direct that any question of law should be first argued, that different questions of fact arising in the same suit should be tried by different modes of trial, and that one or more questions of fact should be tried before the others.

“The system which, in all the Divisions of the Supreme Court to which it can be conveniently applied, we would suggest for the trial of matters suitable for trial by Referees, is as follows:—

“We think that there should be attached to the Supreme Court officers to be called official Referees, and that a Judge should have power, at any time after the writ of summons, and with or without pleadings, and generally upon such terms as he may think fit, to order a cause, or any matter arising therein, to be tried by a Referee; and that, whenever a cause is to be tried by a Referee, such trial should be by one of these official Referees, unless a Judge otherwise orders. We think, however, that a Judge should have power to order such trial to be by some person not an official Referee of the Court, but who upon being so appointed should *pro hac vice* be deemed to be and should act as if he were an official Referee. The Judge should have power to direct where the trial shall take place, and the Referee should be at liberty, subject to any directions which may from time to time be given by the Judge, to adjourn the trial to any place which he may deem to be more convenient.

“The Referee should, unless the Judge otherwise direct proceed with the trial in open Court, *de die in diem*, with power, however, to adjourn the further hearing for any cause which he may deem sufficient, to be certified under his hand to the Court.

“The Referee should be at liberty, by writing under his hand, to reserve, or pending the reference to submit any question for the decision of the Court, or to state any facts specially, with power to the Court to draw inferences; and the verdict should in such case be entered as the Court may direct. In all other respects the decision of the Referee should have the same effect as a verdict at *Nisi Prius*, subject to the power of the Court to require any explanation or reasons from the Referee, and to remit the cause or any

part thereof for re-consideration to the same, or any other Referee. The Referee should, subject to the control of the Court, have full discretionary power over the whole or any part of the costs of the proceeding before him.”*

“Subject to any Rules of Court.” The Rules of Court relative to Referees will be found in Order XXXVI., Rules 2, 5, 30, 31, 32, 33 and 34 of the first Schedule to the Supreme Court of Judicature Act, 1875. It will be seen, on a perusal of them, that, like the sections of this Act dealing with the same subject matter, they follow very closely the recommendations and not unfrequently the *ipsissima verba* of the Judicature Commission.

SECTION 57.—*Power to direct Trials before Referees.*

In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury, or conducted by the Court through its other ordinary officers, the Court or a Judge may at any time, on such terms as may be thought proper, order any question or issue of fact or any question of account arising therein to be tried either before an official Referee, to be appointed as hereinafter provided, or before a special Referee to be agreed on between the parties ; and

* First Report of the Judicature Commission, pp. 13, 14.

any such special Referee so agreed on shall have the same powers and duties and proceed in the same manner as an official Referee. All such trials before Referees shall be conducted in such manner as may be prescribed by Rules of Court, and subject thereto in such manner as the Court or Judge ordering the same shall direct.

See Order XXXVI., Rules 2, 5, 30, 31, 32, 33, and 34 of the first Schedule to the Supreme Court of Judicature Act, 1875. See also section 56, *supra*, and the note thereto, and sections 58, 59 and 83, *infra*.

SECTION 58.—*Power of Referees and effect of their Findings.*

In all cases of any reference to or trial by Referees under this Act the Referees shall be deemed to be officers of the Court, and shall have such authority for the purpose of such reference or trial as shall be prescribed by Rules of Court or (subject to such Rules) by the Court or Judge ordering such reference or trial; and the report of any Referee upon any question of fact on any such trial shall (unless set aside by the Court) be equivalent to the verdict of a jury.

See sections 56 and 57, *supra*, and the note to s. 56, and sections 59 and 83, *infra*. Also Schedule 1, Order XXXVI., Rules 2, 5, 30, 31, 32, 33, and 34 of the Supreme Court of Judicature Act, 1875.

SECTION 59.—*Powers of Court with respect to Proceedings before Referees.*

With respect to all such proceedings before

Referees and their Reports, the Court or such Judge as aforesaid shall have, in addition to any other powers, the same or the like powers as are given to any Court whose jurisdiction is hereby transferred to the said High Court with respect to references to arbitration and proceedings before arbitrators and their awards respectively, by the Common Law Procedure Act, 1854.

See sections 56, 57, and 58, *supra*, and the note to s. 56, and section 83, *infra*; and see also Schedule 1, Order XXXVI., Rules 2, 5, 30, 31, 32, 33, and 34 of the Supreme Court of Judicature Act, 1875.

The sections of the Common Law Procedure Act, 1854, dealing with arbitrations, are ss. 3 to 17 inclusive.

SECTION 60.—*Her Majesty may establish District Registries in the country for the Supreme Court.*

And whereas it is expedient to facilitate the prosecution in country districts of such proceedings as may be more speedily, cheaply, and conveniently carried on therein, it shall be lawful for Her Majesty, by Order in Council, from time to time to direct that there shall be District Registrars in such places as shall be in such order mentioned for districts to be thereby defined, from which writs of summons for the commencement of actions in the High Court of Justice may be issued, and in which such proceedings may be taken and recorded as are hereinafter mentioned; and Her Majesty may thereby appoint that any

Registrar of any County Court, or any Registrar or Prothonotary or District Prothonotary of any local Court whose jurisdiction is hereby transferred to the said High Court of Justice, or from which an appeal is hereby given to the said Court of Appeal, or any person who, having been a District Registrar of the Court of Probate, or of the Admiralty Court, shall under this Act become and be a District Registrar of the said High Court of Justice, or who shall hereafter be appointed such District Registrar, shall and may be a District Registrar of the said High Court for the purpose of issuing such writs as aforesaid, and having such proceedings taken before him as are hereinafter mentioned. This section shall come into operation immediately upon the passing of this Act.

This section is amended by section 13 of the Supreme Court of Judicature Act, 1875, by which it is provided that two persons may be appointed joint District Registrars, and that the Registrar of any inferior Court of Record (other than a County Court) in any district shall be qualified to be a District Registrar for that district or for any part of it. The same section also provides that "every District Registrar shall be deemed to be an officer of the Supreme Court, and be subject, accordingly, to the jurisdiction of such Court or of the Divisions thereof."

For a list of the local Courts whose jurisdiction is transferred to the High Court of Justice, see section 16, *supra*, and as to the Appellate Jurisdiction of the Court of Appeal from local Courts, see ss. 18 (2) (3) and 45, *supra*.

The scheme of establishing District Registries was thus

introduced to the notice of the House of Lords by Lord Selborne, C., in 1873.* "There is another subject with which I have attempted to deal, and its object is to remove what for twenty years and more has been represented as a grievance by solicitors of Liverpool and other large towns. These gentlemen have constantly urged that, to make a measure perfect, means should be given, subject to the control of the Court, to take formal proceedings, such as giving out writs and the like, in local registries in the country. This suggestion I have endeavoured to meet, and in effect, all country registries over which the Court will have control under this Bill will be made available for that purpose. In many cases, I believe, the result may be the saving of much expense."†

In the House of Commons an effort was made by Mr. Lopes, Q.C., to get rid of the clauses relating to local registries, on the ground that the District Registrars would not be competent to discharge the judicial and contentious jurisdiction confided to them by the Bill. "Matters now dealt with by Judges and Masters would be dealt with by the district registrar." The hon. gentleman said that, although local solicitors favoured this local jurisdiction with regard to the issue of writs, and dealing locally with mere ministerial matters, they did not desire that contentious and judicial business should be disposed of in local registries.

Sir Richard Baggallay, the present Attorney-General, referred to the provisions of clause 64, which are to the effect that "all such proceedings as may and ought to be taken in the High Court down to and including" (in certain cases) "final judgment, may betaken before the District Registrar," and he urged that the duties of the District Registrar ought to be purely ministerial.

The Solicitor-General (Sir George Jessel, now M.R.), said he thought he could relieve his learned friends from some of their apprehensions by pointing out that the powers to be

* Hansard's Parliamentary Debates, new series, vol. 214, pp. 347, 348.

† No further allusion to District Registries was made in the course of the subsequent debates on the measure in the House of Lords.

conferred upon District Registrars were to be subject to Rules of Court.*

It will be seen, however, on referring to the Rules of Court contained in the first Schedule to the Supreme Court of Judicature Act, 1875, Order XXXV., that the duties of a District Registrar are much more than ministerial. Thus, by Rule 4, "where an action proceeds in a District Registry, the District Registrar may exercise all such authority and jurisdiction in respect of the action as may be exercised by a Judge at Chambers, except such as by these Rules a Master of the Queen's Bench, Common Pleas, or Exchequer Division is precluded from exercising." In other words, the powers of a District Registrar are co-extensive with those of a Master of any of the Common Law Courts under the 30 and 31 Vict., c. 68, and the Reg. Gen. Michaelmas Term, 1867 (as amended by O. LIV., R. 2).† Rule 1 practically repeats the provisions of s. 64, *infra*. Under the present section, however, and s. 13 of the Amending Act, the choice of District Registrars is limited to Registrars of County Courts, or inferior Courts of Record, Registrars and Prothonotaries, or District Prothonotaries‡ of the Courts of the Counties Palatine, and the Stannaries Courts, and District Registrars of the Probate and Admiralty Courts, all of whom must have had some experience.

This present section being expressly excepted from section 2, *supra*, came in force on the 5th of August, 1873, the day on which this Act received the Royal Assent.

It was anticipated by many country Solicitors that the appointments under the Act would have been made immediately on its passing. The first appointments under the Act were not, however, made till the 13th of August, 1875. See the Order in Council, *infra*, and also the note to s. 13 of the Amending Act.

SECTION 61.—*Seals of District Registries.*

In every such District Registry such seal shall

* Hansard's Parliamentary Debates, new series, vol. 217, pp. 182, 183, 184.

† See also the "Directions to the Masters of the Court;" Hil. T., 1853, as to fees of counsel and special pleaders; Day's Com. Law. Pro. Acts, 534.

‡ See 32 and 33 Vict., c. 37.

be used as the Lord Chancellor shall from time to time, either before or after the time fixed for the commencement of this Act, direct, which seal shall be impressed on every writ and other document issued out of or filed in such District Registry, and all such writs and documents, and all exemplifications and copies thereof, purporting to be sealed with the seal of any such District Registry, shall in all parts of the United Kingdom be received in evidence without further proof thereof.*

SECTION 62.—*Powers of District Registrars.*

All such District Registrars shall have power to administer oaths and perform such other duties in respect of any proceedings pending in the said High Court of Justice or in the said Court of Appeal as may be assigned to them from time to time by Rules of Court, or by any special order of the Court.

The first Schedule, Order XXXV. of the Supreme Court of Judicature Act, 1875, defines the duties of the District Registrars (see note to s. 60).

SECTION 63.—*Fees to be taken by District Registrars.*

The Lord Chancellor, with the sanction of the Treasury, may, either before or after the commencement of this Act, fix, and may afterwards, with the like sanction, from time to time alter, a Table of fees to be taken by such District Registrars in respect of all business to be done under this Act; and such fees shall be received and collected by stamps, denoting in each case the amount of the fee payable. The provisions of the "Courts of Justice (Salaries and

* See "Taylor on Evidence."

Funds) Act, 1869," as to fees to be taken by stamps, shall apply to the fees to be received and collected by stamps under this Act.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule thereto. The substituted provisions will be found in s. 26 of the Supreme Court of Judicature Act, 1875.

SECTION 64.—*Proceedings to be taken in District Registries.*

Subject to the Rules of Court in force for the time being, writs of summons for the commencement of actions in the High Court of Justice shall be issued by the District Registrars when thereunto required; and unless any order to the contrary shall be made by the High Court of Justice, or by any Judge thereof, all such further proceedings, including proceedings for the arrest or detention of a ship, her tackle, apparel, furniture, cargo, or freight, as may and ought to be taken by the respective parties to such action in the said High Court down to and including entry for trial, or (if the plaintiff is entitled to sign final judgment, or to obtain an order for an account by reason of the non-appearance of the defendant) down to and including final judgment, or an order for an account may be taken before the District Registrar, and recorded in the District Registry, in such manner as may be prescribed by Rules of Court; and all such other proceedings in any such action as may be prescribed by Rules of Court

shall be taken and if necessary may be recorded in the same District Registry.

See the Rules of Court in Orders V. and XXXV. of Schedule 1 to the Supreme Court of Judicature Act, 1875. See also the note to s. 60, *supra*, as to the magnitude of the power conferred by this section on District Registrars.

SECTION 65.—*Power for Court to remove proceedings from District Registries.*

Any party to an action in which a writ of summons shall have been issued from any such District Registry shall be at liberty at any time to apply, in such manner as shall be prescribed by Rules of Court, to the said High Court, or to a Judge in Chambers of the Division of the said High Court to which the action may be assigned, to remove the proceedings from such District Registry into the proper Office of the said High Court; and the Court or Judge may, if it be thought fit, grant such application, and in such case the proceedings and such original documents, if any, as may be filed therein shall upon receipt of such order be transmitted by the District Registrar to the proper Office of the said High Court, and the said action shall thenceforth proceed in the said High Court in the same manner as if it had been originally commenced by a writ of summons issued out of the proper Office in London; or the Court or Judge, if it be thought right, may thereupon direct that the proceedings

may continue to be taken in such District Registry.

“In such manner as shall be prescribed by Rules of Court.” See Order XXXV. of the first Schedule to the Supreme Court of Judicature Act, 1875.

SECTION 66.—*Accounts and Inquiries may be referred to District Registrars.*

It shall be lawful for the Court, or any Judge of the Division to which any cause or matter pending in the said High Court is assigned, if it shall be thought fit, to order that any books or documents may be produced, or any accounts taken or inquiries made, in the office of or by any such District Registrar as aforesaid; and in any such case the District Registrar shall proceed to carry all such directions into effect in the manner prescribed; and in any case in which any such accounts or inquiries shall have been directed to be taken or made by any District Registrar, the report in writing of such District Registrar as to the result of such accounts or inquiries may be acted upon by the Court, as to the Court shall seem fit.

By Order XXXIII of the first Schedule to the Supreme Court of Judicature Act, 1875, the Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, or that it may be proper that the cause or matter should proceed in the ordinary manner.

SECTION 67.—30 & 31 *Vict.*, c. 142, ss. 5, 7, 8 and 10, *to extend to actions in High Court.*

The provisions contained in the fifth, seventh, eighth, and tenth sections of the County Courts Acts, 1867,* shall apply to all actions commenced or pending in the said High Court of Justice in which any relief is sought which can be given in a County Court.

Mr. Matthews, Q.C., in Committee on the Bill in the Lower House, moved the omission of the fifth section of the County Courts Act, 1867, on the ground that it would be unnecessary under the new procedure, as the question of costs would be in the discretion of the Judge.† The motion, however, was withdrawn, the Attorney-General (Lord Coleridge) thinking it necessary to retain the section.

The following are the sections referred to in the present section :—

“ 5. If in any action commenced after the passing of this Act in any of Her Majesty’s Superior Courts of record, the plaintiff shall recover a sum not exceeding twenty pounds if the action is founded on contract, or ten pounds if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the Judge certify on the record that there was sufficient reason for bringing such action in such Superior Court, or unless the Court or a Judge at Chambers shall, by a rule or order, allow such costs. 7. Where in any action of contract brought or commenced in any of Her Majesty’s Superior Courts of Common Law the claim endorsed on the writ does not exceed fifty pounds, or where such claim, though it originally exceeded fifty pounds is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding

* 30 & 31 *Vict.*, c. 142.

† This was subsequently qualified as to trial by jury. (See Order LV.)

fifty pounds, it shall be lawful for the defendant in the action, within eight days from the day upon which the writ shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a Judge at Chambers for a summons to the plaintiff to show cause why such action should not be tried in the County Court or one of the County Courts in which the action might have been commenced; and on the hearing of such summons the Judge shall, unless there be good cause to the contrary, order such action to be tried accordingly, and thereupon the plaintiff shall lodge the original writ and the order with the Registrar of the County Court mentioned in the order, who shall appoint a day for the hearing of the cause, notice whereof shall be sent, by post or otherwise, by the Registrar to both parties or their attorneys, and the cause and all proceedings therein shall be heard and taken in such County Court as if the action had been originally commenced in such County Court; and the costs of the parties in respect of proceedings subsequent to the order of the Judge of the Superior Court shall be allowed according to the scale of costs in use in the County Courts, and the costs of the proceedings previously had in the Superior Court shall be allowed according to the scale in use in such latter Court.

8. Where any suit or proceeding shall be pending in the High Court of Chancery, which suit or proceeding might have been commenced in a County Court, it shall be lawful for any of the parties thereto to apply at Chambers to the Judge to whose Court the said suit or proceeding shall be attached, to have the same transferred to the County Court or one of the County Courts in which the same might have been commenced, and such Judge shall have power upon such application, or without such application, if he shall see fit, to make an order for such transfer, and thereupon such suit or proceeding shall be carried on in the County Court to which the same shall be ordered to be transferred, and the parties thereto shall have the same right of appeal that they would have had had the suit or proceeding been commenced in the County Court.

10. It shall be lawful for any person against whom an action for malicious prosecution, illegal arrest, illegal distress,

assault, false imprisonment, libel, slander, seduction, or other action of tort may be brought in a Superior Court to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant, should a verdict be not found for the plaintiff, and thereupon a Judge of the Court in which the action is brought shall have power to make an order, that, unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's cost to the satisfaction of one of the Masters of the said Court, or satisfy the Judge that he has a cause of action fit to be prosecuted in the Superior Court, all proceedings in the action shall be stayed, or, in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the Judge as aforesaid, that the cause be remitted for trial before a County Court to be therein named; and thereupon the plaintiff shall lodge the original writ and the order with the Registrar of such County Court, who shall appoint a day for the hearing of the cause, notice whereof shall be sent, by post or otherwise, by the Registrar to both parties or their Attorneys; and the County Court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said County Court should have power to try the said action, and the same had been commenced by plaint in the said County Court; and the cost of the parties in respect of the proceedings subsequent to the order of the Judge of the Superior Court shall be allowed according to the scale of costs in use in the County Courts, and the costs of the proceedings in the Superior Courts shall be allowed according to the scale in use in such latter Court.

SECTION 68.—*Rules of Court may be made by Order in Council before commencement of the Act. Rules to be laid before Parliament, and may be annulled on address from either House.*

Subject to the provisions of this Act, Her Majesty may, at any time before the commencement of this Act, by and with the advice of the Lord Chancellor, the Lord Chief Justice of England, and the other Judges of the several

Courts intended to be united and consolidated by this Act, or of the greater number of them (of whom the Lord Chancellor and the Lord Chief Justice of England shall be two), cause to be prepared Rules, in this Act referred to as Rules of Court, providing as follows :

- (1.) *For the regulation of the sittings of the High Court of Justice and the Court of Appeal, and of any Divisional or other Courts thereof respectively, and of the Judges of the said High Court sitting in Chambers ;*
- (2.) *For the regulation of Circuits, including the times and places at which they are to be holden and the business to be transacted thereat ;*
- (3.) *For the regulation of all matters consistent with or not expressly determined by the Rules contained in the Schedule hereto, which, under and for the purposes of such last-mentioned Rules, require to be, or conveniently may be, defined or regulated by further Rules of Court ;*
- (4.) *And, generally, for the regulation of any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or to the costs of proceedings therein, or to the conduct of civil or criminal business coming within the cognizance of the said Courts respectively, for which provision is not expressly made by this Act or by the Rules contained in the Schedule hereto.*

All Rules of Court made in pursuance of this section shall be laid before each House of Parliament within forty days next after the same are made, if Parliament is then sitting, or if not, within forty days after the then next meeting of Parliament ; and if an address is presented to Her Majesty by either of the said Houses, within the next subsequent forty days on which the said House shall have sat, praying that any such Rules may be annulled, Her Majesty may thereupon by Order in Council annul the same ; and the Rules so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same. This section shall come into operation immediately on the passing of this Act.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule thereto. The substituted provisions will be found in sections 17, 23, and 25 of the Supreme Court of Judicature Act, 1875. That part of present section which relates to laying "Rules of Court" before Parliament within 40 days is re-enacted *verbatim* in the 25th section of the Amending Act, except that it is extended to "Orders in Council." The 23rd section of the Amending Act contains elaborate provisions for the regulation of Circuits in substitution for the second subsection of the

present section. Section 93 of the present Act contains a reference to this section in the words, "except as herein is expressly directed." One of the causes of the suspension of the Supreme Court of Judicature Act, 1873, and of the withdrawal of the Supreme Court of Judicature Bill, 1874, was the delay in the preparation and publication of the Rules, which this section empowered the Crown, on the recommendation of a majority of the Judges, to make.

It will be perceived that this is one of the sections which came into effect immediately on the passing of the Act. (See s. 2, *supra*.)

The Rules framed under this section were never signed by the Judges, and never came in force.* They are now substantially embodied in the first Schedule to the Supreme Court of Judicature Act, 1875.

SECTION 69.—*Rules in Schedule to regulate Procedure till changed by other Rules after commencement of Act.*

The Rules contained in the Schedule to this Act (which shall be read and taken as part of this Act) shall come into operation immediately on the commencement of this Act, and, as to all matters to which they extend, shall thenceforth regulate the proceedings in the High Court of Justice and the Court of Appeal respectively, unless and until, by the authority hereinafter in that behalf provided, any of them may be altered or varied; but such Rules, and also all Rules to be made before the commencement of this Act, as hereinbefore mentioned, shall for all the purposes of this Act be Rules of Court capable of being annulled or altered by the same authority by which any other Rules of Court may be made, altered, or annulled after the commencement of this Act.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule thereto. The substituted provisions will be found in section 16 of that Act. The present section is practically re-enacted, but with the necessary alterations to adapt its provisions to the first Schedule of the Amending Act.

When introducing the present measure, Lord Selborne,

* They were, however, printed by order of the House of Commons, on the motion of Sir William Harcourt, and can be obtained at Hansard's.

C., referred to the Rules in the Schedule in the following terms :—

“It was thought by some to be a considerable defect in the Bill of 1870, that it left the whole question of procedure to be determined afterwards by extrinsic authority. In the main, rules of procedure must be so determined. At the same time, nothing is more important than to have a good start; and, profiting by the discussions of 1870, my predecessor* obtained the assistance of *some eminent members of the Judicature Commission, who drew up a series of Rules* embodying the recommendations of the Commission on that subject, which, since they were first framed, have been further considered and revised; and those Rules will be found in the Schedule of the Bill. I may say, generally, that they cover all the main points of procedure, and their object is to get rid of long and expensive pleadings, to establish a single uniform system, to constitute the means of giving a decision when there is no practical defence, and in many other respects to introduce useful improvements.” †

It may be added, that the Rules of the Schedule, although they are repealed by the Amending Act, are re-enacted, almost *verbatim*, in the first Schedule to that Act, being incorporated with the Rules of Court referred to in the note to the last section.

SECTION 70.—*Rules of Probate, Divorce, Admiralty, and Bankruptcy Courts to be Rules of the High Court.*

All Rules and Orders of Court which shall be in force in the Court of Probate, the Court for Divorce and Matrimonial Causes, the Admiralty Court, and the London Court of Bankruptcy respectively at the time of the commencement of this Act, except so far as they are hereby expressly varied, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively, in the same manner in all respects as if they had been contained in the Schedule to this Act, until they shall respectively be altered or annulled by any Rules of Court made after the commencement of this Act.

* Lord Hatherley, C.

† Hansard's Parliamentary Debates, New Series, vol. 214, p. 347.

This section is repealed by the Supreme Court of Judicature Act, 1875, section, 33, and the second Schedule. The substituted provisions will be found in section 18 of that Act. Section 70 of the Principal Act is re-enacted, with the substitution of "appeals from the Chief Judge in Bankruptcy" for "the London Court of Bankruptcy." This alteration is rendered necessary by the severance of the London Court of Bankruptcy from the High Court of Justice under sections 9 and 33 and the second Schedule to that Act, and the retention of appeals to the Court of Appeal from the Chief Judge in Bankruptcy, provided by section 17 of the present Act and saved by subsection 2 of section 9 of that Act.

See, as to the Rules and Orders of Court here referred to, the Appendix II. to Browne's "Treatise on the Principles and Practice of the Court for Divorce and Matrimonial Causes;" Appendix II. to Coote and Tristram's "Practice of the Court of Probate;" the Appendix to Williams and Bruce's "Jurisdiction and Practice of the High Court of Admiralty;" and pp. 507 and 598 of Roche and Hazlett's "Law and Practice in Bankruptcy:" 2nd edition (1873).

SECTION 71.—*Criminal procedure, subject to future Rules, to remain unaltered.*

Subject to any Rules of Court to be made under and by virtue of this Act the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice and in the Court of Appeal respectively, including the practice and procedure with respect to Crown Cases Reserved, shall be the same as the practice and procedure in similar causes and matters before the passing of this Act.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule. The substituted provisions will be found in section 19 of that Act (see the notes to that section). The present section is re-enacted, with the alterations necessary to adapt it to the first Schedule of that Act.

SECTION 72.—*Act not to affect Rules of Evidence or Juries.*

Nothing in this Act or in the Schedule hereto, or in any Rules of Court to be made by virtue hereof, save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the Rules of Evidence, or the law relating to jurymen or juries.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule. The substituted provisions will be found in section 20 of that Act (see the notes to that section). The present section is re-enacted, with the addition of the word "first" before "Schedule."

SECTION 73.—*Saving of existing procedure of Courts when not inconsistent with this Act or Rules.*

Save as by this Act, or by any Rules of Court (whether contained in the Schedule to this Act, or to be made under the authority thereof), is or shall be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is hereby transferred to the said High Court, and to the said Court of Appeal respectively, under or by virtue of any law, custom, General Orders, or Rules whatsoever, and which are not inconsistent with this Act or with any Rules contained in the said Schedule or to be made by virtue of this Act, may continue to be used and practised in the said High Court of Justice and the said Court of Appeal respectively, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so transferred, if this Act had not passed.

This is one of the transition clauses of this Act. It is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule. The substituted provisions will be found in the 21st section of that Act. The present section is re-enacted, with the alterations necessary to adapt it to the Amending Act.

SECTION 74.—*Power to make and alter Rules after commencement of Act.*

From and after the commencement of this Act, the Supreme Court may at any time, with the concurrence of a majority of the Judges thereof present at any meeting for that purpose held (of which majority the Lord Chancellor shall be one), alter or annul any Rules of Court for the time being in force, or make any new Rules of Court, for the purpose of regulating all such matters of practice and procedure in the Supreme Court, or relating to the suitors or officers of the said Court, or otherwise, as under the provisions of this Act are or may be regulated by Rules of Court: Provided, that any Rule made in the exercise of this power, whether for altering or annulling any then existing Rule, or for any other purpose, shall be laid before both Houses of Parliament, within the same time, and in the same manner and with the same effect in all respects, as is hereinbefore provided with respect to the said Rules to be made before the commencement of this Act, and may be annulled and made void in the same manner as such last-mentioned Rules.

This section is repealed by the Supreme Court of Judicature Act, 1875, section 33, and the second Schedule. The substituted provisions will be found in section 17 of that Act. As to the power to make Rules before the commencement of the Act, see section 68, *supra*.

SECTION 75.—*Councils of Judges to consider Procedure and Administration of Justice.*

A Council of the Judges of the Supreme Court, of which due notice shall be given to all the said Judges, shall assemble once at least in every year, on such day or days as shall be fixed by the Lord Chancellor, with the concurrence of the Lord Chief Justice of England, for the purpose of considering the operation of this Act and of the Rules of Court for the time being in force, and also the working of the several offices and the arrangements relative to the duties of the officers of the said Courts respectively, and of inquiring and

examining into any defects which may appear to exist in the system of procedure or the administration of the law in the said High Court of Justice or the said Court of Appeal, or in any other Court from which any appeal lies to the said High Court, or any Judge thereof, or to the said Court of Appeal: And they shall report annually to one of Her Majesty's Principal Secretaries of State what (if any) amendments or alterations it would in their judgment be expedient to make in this Act, or otherwise relating to the administration of justice, and what provisions (if any), which cannot be carried into effect without the authority of Parliament, it would be expedient to make for the better administration of justice. Any Extraordinary Council of the said Judges may also at any time be convened by the Lord Chancellor,

The Common Law Judges meet together from time to time, for the purpose of consultation; but it is apprehended that such a meeting as that contemplated in this section, of all the Judges, whether of Equity or Common Law, for the expression "Supreme Court" includes the Judges of the Court of Appeal as well as the Judges of the High Court of Justice, is comparatively new. It is calculated to produce the most beneficial effects, by breaking down the barrier of prejudice which still subsists, it is to be feared, between the sages of Equity and of the Common Law. The Judges, if not the doctrines, of Equity and Common Law, will be "fused" in this Council.

The 32nd section, *supra*, speaks of "Her Majesty in Council" acting upon a "report or recommendation of the Council of Judges of the Supreme Court;" and it will be seen that the present section speaks of a report being sent

to "one of Her Majesty's Principal Secretaries of State" by the Council of Judges. The reader will be reminded of the *Consilium Regis*, of which so frequent mention is made in old statutes, by Lord Hale, Sir Edward Coke, and other old law writers. Sir William Blackstone says that "when the King's Council is mentioned generally, it must be defined, particularized, and understood *secundum subjectam materiam*; and if the subject be of a legal nature, then by the 'King's Council' is understood his Council for matters at law, namely, his Judges."*

SECTION 76.—*Acts of Parliament relating to former Courts to be read as applying to Courts under this Act.*

All Acts of Parliament relating to the several Courts and Judges, whose jurisdiction is hereby transferred to the said High Court of Justice and the said Court of Appeal respectively, or wherein any of such Courts or Judges are mentioned or referred to, shall be construed and take effect, so far as relates to anything done or to be done after the commencement of this Act, as if the said High Court of Justice or the said Court of Appeal, and the Judges thereof, respectively, as the case may be, had been named therein instead of such Courts or Judges whose jurisdiction is so transferred respectively; and in all cases (not hereby expressly provided for) in which, under any such Act, the concurrence or the advice or consent of the Judge or any Judges or of any number of the Judges, of any one or more of the Courts whose jurisdiction is

* 1 Black. Com., 229; 1 Inst., 110; 3 Inst., 125.

hereby transferred to the High Court of Justice is made necessary to the exercise of any power or authority capable of being exercised after the commencement of this Act, such power or authority may be exercised by and with the concurrence, advice, or consent of the same or a like number of Judges of the said High Court of Justice; and all general and other Commissions, issued under the Acts relating to the Central Criminal Court or otherwise, by virtue whereof any Judges of any of the Courts whose jurisdiction is so transferred may, at the commencement of this Act, be empowered to try, hear, or determine any causes or matters, criminal or civil, shall remain and be in full force and effect, unless and until they shall respectively be in due course of law revoked or altered.

This is one of the transition clauses of this Act.

PART V,

OFFICERS AND OFFICES.

SECTION 77.—*Transfer of existing Staff of Officers to Supreme Court.*

The Queen's Remembrancer and all Masters, Secretaries, Registrars, Clerks of Records and Writs, Associates, Prothonotaries, Chief and other Clerks, Commissioners to take oaths or affidavits, Messengers, and other officers and assistants at the time of the commencement of this Act attached to any Court or Judge whose

jurisdiction is hereby transferred to the High Court, or to the Court of Appeal, and also all Registrars, Clerks, officers, and other persons at the time of the commencement of this Act engaged in the preparation of commissions or writs, or in the registration of judgments or any other ministerial duties in aid of, or connected with, any Court, the jurisdiction of which is hereby transferred to the said Courts respectively, shall, from and after the commencement of this Act, be attached to the Supreme Court, consisting of the said High Court of Justice and the said Court of Appeal: Provided, that all the duties with respect to Appeals from the Court of Chancery of the County Palatine of Lancaster, which are now performed by the Clerk of the Council of the Duchy of Lancaster, shall be performed by Registrars, Taxing Masters, and other officers by whom like duties are discharged in the Supreme Court; and the said Clerk of the Council of the Duchy of Lancaster shall not be an officer attached to the said Court.

The officers so attached shall have the same rank and hold their offices by the same tenure and upon the same terms and conditions, and receive the same salaries, and, if entitled to pensions, be entitled to the same pensions, as if this Act had not passed, and any such officer who is removeable by the Court to which he is now attached shall be removeable by the Court to

which he shall be attached under this Act, or by the majority of the Judges thereof.

The existing Registrars and Clerks to the Registrars in the Chancery Registrars' office shall retain any right of succession secured to them by Act of Parliament, so as to entitle them in that office, or in any substituted office, to the succession to appointments with similar or analogous duties and with equivalent salaries.

The business to be performed in the High Court of Justice and in the Court of Appeal respectively, or in any Divisional or other Court thereof, or in the Chambers of any Judge thereof, other than that performed by the Judges, shall be distributed among the several officers attached to the Supreme Court by this section in such manner as may be directed by Rules of Court; and such officers shall perform such duties in relation to such business as may be directed by Rules of Court, with this qualification, that the duties required to be performed by any officer shall be the same, or duties analogous to those which he performed previously to the passing of this Act; and, subject to such Rules of Court, all such officers respectively shall continue to perform the same duties, as nearly as may be, in the same manner as if this Act had not passed.

All Secretaries, Clerks, and other officers attached to any existing Judge who under the provisions of this Act shall become a Judge of

the High Court of Justice, or of the Court of Appeal, shall continue attached to such Judge and shall perform the same duties as those which they have hitherto performed, or duties analogous thereto ; and all such last-mentioned officers shall have the same rank and hold their offices by the same tenure, and upon the same terms and conditions, and receive the same salaries, and, if entitled to pensions, be entitled to the same pensions, as if this Act had not passed : Provided that the Lord Chancellor may, with the consent of the Treasury, increase the salary of any existing officer whose duties are increased by reason of the passing of this Act.

Upon the occurrence of a vacancy in the office of any officer coming within the provisions of this section, the Lord Chancellor, with the concurrence of the Treasury, may, in the event of such office being considered unnecessary, abolish the same, or may reduce the salary, or alter the designation or duties thereof, notwithstanding that the patronage thereof may be vested in an existing Judge. Nothing in this Act contained shall interfere with the office of Marshal attending any Commissioner of Assize.

This is one of the transition clauses of this Act.

See s. 8 of the Amending Act, as to the office of Registrar in Ecclesiastical and Maritime Causes.

Section 34 of the Supreme Court of Judicature Act, 1875, after reciting the last paragraph of this section, enacts, that "upon the occurrence of any vacancy coming within the provisions of the " present " section, an appoint-

ment shall not be made thereto for the period of one month without the assent of the Lord Chancellor, given with the concurrence of the Treasury ; and, further, the Lord Chancellor may, with the concurrence of the Treasury, suspend the making any appointment to such office for any period not later than the first day of January, One thousand eight hundred and seventy-seven, and may, if it be necessary, make provision in such manner as he thinks fit for the temporary discharge, in the meantime, of the duties of such office."

The principal statutes in connection with "the Queen's Remembrancer" are as follows:—As to the duties of Queen's Remembrancer, 3 and 4 Will. IV., c. 99 ; as to the appointment of Queen's Remembrancer, 22 and 23 Vict., c. 21 ; as to the duties in revenue matters in Court of Exchequer, 5 Vict., c. 5 ; 5 and 6 Vict., c. 86 ; as to the regulation of the office, 22 and 23 Vict., c. 21 ; as to the approval of Sheriffs of London and Middlesex, and render of rents by the Corporation of London in the office of Queen's Remembrancer, 22 and 23 Vict., c. 21 ; as to the salary of Queen's Remembrancer, 29 and 30 Vict., c. 101 ; as to the issue of writ of distringas from the office of Queen's Remembrancer, 28 and 29 Vict., c. 104.*

As to the appointment, salaries, duties, and superannuation of masters and their officers, see 7 Will. IV. and 1 Vict. c. 30 ; 17 and 18 Vict., c. 94 ; 22 Vict., c. 26, s. 14 ; 29 and 30 Vict., c. 101 ; 30 and 31 Vict., c. 68 ; and 32 and 33 Vict., c. 18.

"Secretaries"—"Registrars."—For the statutes referring to these officers, see the statutes collected by Baxter, in his notes on the various Courts and Judges.

"Clerks of Records and Writs."—The statutes referring to these offices will be found collected by Baxter in Note 5, "The High Court of Chancery of England ;" in the second division of the list of statutes, "Officers and Income."

"Associates."—The statutes referring to this officer will be found among the statutes collected by Baxter in Note 36, "Commission of Assize ;" and Note 24, "Superior Courts of Common Law."

* Wynne E. Baxter on the Judicature Act, 1873.

“Prothonotaries.”—See statutes in Baxter, Note 34, “Inferior Courts of Common Law;” see also Note 98, Prothonotary or District Prothonotary of Local Court.”

“Chief or other Clerks.”—For the statutes referring to the Chief Clerks and Clerks to Judges, see notes to the various Courts and Judges, and note, “Superior Courts of Common Law,” in Baxter. As to the Clerk of Assize and Clerk of the Crown, see Note 36, “Commission of Assize,” in Baxter. As to the Clerk of the Crown in Chancery his duties, salary, and the fees to be taken by him, see 3 and 4 Will. IV., c. 84; 5 and 6 Will. IV., c. 47; 7 and 8 Vict., c. 77; 15 and 16 Vict., c. 87, s. 23; 17 and 18 Vict., c. 94; 32 and 33 Vict., c. 91.*

The principal statutes on the subject of “Commissioners to take Oaths and Affidavits” are 29 Car. II., c. 5; 3 and 4 Will. IV., c. 42; 22 Vict., c. 16; 55 Geo. III., c. 15; 16 and 17 Vict., c. 78; and 23 and 24 Vict., c. 127.

See further, as to officers, Order LX. of the first Schedule to the Amending Act.

SECTION 78.—*Officers of Courts of Pleas at Lancaster and Durham.*

The existing Queen’s Counsel of the County Palatine of Lancaster shall for the future have the same precedence in the county, and the existing Prothonotaries and District Prothonotaries, and other officers of the Court of Common Pleas at Lancaster and the Court of Pleas at Durham respectively, and their successors, shall (subject to Rules of Court) perform the same or the like duties, and exercise the same or the like powers and authorities in respect of all causes and matters depending in those Courts respectively at the commencement of this Act, and also in respect of all causes and matters which may

* The Clerk of the Council of the Duchy of Lancaster is Mr. J. G. D. Engleheart, Lancaster Place, Waterloo Bridge, London.

afterwards be commenced in the High Court of Justice in the manner heretofore practised in the said Court of Common Pleas at Lancaster and the said Court of Pleas at Durham respectively, as at the commencement of this Act may lawfully be performed and exercised by them respectively under any Acts of Parliament for the time being in force with respect to the said last-mentioned Courts respectively, or under any other authority; and all powers in respect of any such Prothonotaries, District Prothonotaries, or other officers of the Court of Common Pleas at Lancaster, which at the commencement of this Act may be vested by law in the Chancellor of the Duchy and County Palatine of Lancaster, under any such Act of Parliament or otherwise, and to which the concurrence of any other authority may not be required, shall and may be exercised after the commencement of this Act by the Lord Chancellor; and all the powers of making or publishing any general rules or orders with respect to the powers or duties of such Prothonotaries, District Prothonotaries, or other officers of the said Court of Common Pleas at Lancaster or the said Court of Pleas at Durham, or with respect to the business of the said Court respectively, or with respect to any fees to be taken therein, or otherwise with reference thereto, which under any such Act as aforesaid or otherwise by law may be vested in the Chancellor of the Duchy and County Palatine

of Lancaster with the concurrence of any Judges or Judge, or in any other authority, shall be exercised after the commencement of this Act in the manner hereby provided with respect to Rules of Court to be made under this Act, and (in all cases in which the sanction of the Treasury is now required) with the sanction of the Treasury; and all provisions made by any such Acts aforesaid, or otherwise for or with respect to the remuneration of any such Prothonotaries, District Prothonotaries, or other officers as aforesaid, shall remain and be in full force and effect, until the same shall be altered under the provisions of this Act, or otherwise by lawful authority.

See section 99, *infra*.

This is one of the transition clauses of the Act.

Although, by section 99, the Counties of Lancaster and Durham cease on the 1st of November, 1875, to be Counties Palatine, so far as respects the issue of Commissions of Assize, and although, by section 16, the jurisdiction vested at that date in the Court of Common Pleas of Lancaster, and Court of Pleas of Durham, is transferred at that date to the High Court of Justice, the then existing Queen's Counsel, Prothonotaries, District Prothonotaries, and other officers of these two local courts are to be protected in the possession of their respective dignities and offices, and placed on substantially the same footing as heretofore with regard to their "duties, powers, and authorities"

The only "Palatine Silk" in Lancashire is Mr. J. J. Aston.* The Prothonotaries and District Prothonotaries of that County are Mr. T. E. Paget, Mr. E. Worthington, and Mr. T. M. Shuttleworth. A list of the other "officers" will be found at pp. 899 and 900 of the Law List.

* For many years the late Mr. Robert Sowler was the only "Lancashire Q.C.," but he was made a Q.C. for England before his death.

The only individual who appears to be deprived by this section of any powers and authorities previously possessed by him is the Chancellor of the Duchy of Lancaster. (See, however, s. 95, *infra*.)

Provisions as to the Prothonotaries' Fee Fund Account of the County of Lancaster, and the salaries and expenses connected with the offices of Prothonotaries and District Prothonotaries under the Common Pleas at Lancaster Amendment Act, 1869, will be found in section 27 of the Supreme Court of Judicature Act, 1875.

SECTION 79.—*Personal officers of future Judges.*

Each of the Judges of the High Court of Justice, and of the Ordinary Judges of the Court of Appeal, appointed respectively after the commencement of this Act, and also such of the Ordinary Judges of the Court of Appeal as have no similar officers at the time of the commencement of this Act, shall have such officers as herein-after mentioned, who shall be attached to his person as such Judge, and appointed and removable by him at his pleasure, and who shall respectively receive the salaries hereinafter mentioned: (that is to say),

To the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, respectively, there shall be attached a Secretary, whose salary shall be five hundred pounds per annum, a Principal Clerk, whose salary shall be four hundred pounds per annum, and a Junior

Clerk, whose salary shall be two hundred pounds per annum. To each of the other Judges of the High Court of Justice, and to each of the Ordinary Judges of the Court of Appeal, there shall be attached a Principal Clerk, whose salary shall be four hundred pounds per annum, and, in the case of the Judges of the High Court of Justice, a Junior Clerk, whose salary shall be two hundred pounds per annum.

Such one or more of the officers so attached to each of the said Judges, as each Judge shall think fit, shall be required, while in attendance on such Judge, to discharge, without further remuneration, the duties of Crier in Court or on Circuit, or of Usher or Train Bearer. The duties of Chamber Clerks, so far as relates to business transacted in chamber by Judges appointed after the commencement of this Act, shall be performed by officers of the Court in the permanent civil service of the Crown.

See section 85, *infra*.

This section effects a considerable change in the position and salaries of the officers attached to the person of the Judges. (See the note to section 35 of the Amending Act.)

SECTION 80.—*Provisions as to officers paid out of fees.*

Any existing officer attached to any existing Court or Judge whose jurisdiction is abolished or transferred by this Act, who is paid out of fees,

and whose emoluments are affected by the passing of this Act, shall be entitled to prefer a claim to the Treasury; and the Treasury, if it shall consider his claim to be established, shall have power to award to him such sum, either by way of compensation, or as an addition to his salary, as it thinks just, having regard to the tenure of office by such officer and to the other circumstances of the case.

This is one of the transition clauses of this Act.

SECTION 81.—*Doubts as to the status of officers to be determined by Rule.*

Where a doubt exists as to the position under this Act of any existing officer attached to any existing Court or Judge affected by this Act, such doubt may be determined by Rules of Court: subject to this proviso, that such Rules of Court shall not alter the tenure of office, rank, pension (if any), or salary of such officer, or require him to perform any duties other than duties analogous to those which he has already performed.

This is one of the transition clauses of this Act.

SECTION 82.—*Powers of Commissioners to administer Oaths.*

Every person who at the commencement of this Act shall be authorised to administer oaths in any of the Courts whose jurisdiction is hereby transferred to the High Court of Justice shall be

a Commissioner to administer oaths in all causes and matters whatsoever which may from time to time be depending in the said High Court or in the Court of Appeal.

This is one of the transition clauses of this Act. By section 84, *infra*, all Commissioners to take oaths or affidavits in the Supreme Courts are to be appointed by the Lord Chancellor. (See, also, section 77.)

SECTION 83.—*Official Referees to be appointed.*

There shall be attached to the Supreme Court permanent officers to be called official Referees, for the trial of such questions as shall under the provisions of this Act be directed to be tried by such Referees. The number and the qualifications of the persons to be so appointed from time to time, and the tenure of their offices, shall be determined by the Lord Chancellor, with the concurrence of the Presidents of the Divisions of the High Court of Justice, or a majority of them (of which majority the Lord Chief Justice of England shall be one), and with the sanction of the Treasury. Such official Referees shall perform the duties entrusted to them in such places, whether in London or in the country, as may from time to time be directed or authorised by any order of the said High Court, or of the Court of Appeal; and all proper and reasonable travelling expenses incurred by them in the discharge of their duties shall be paid by the Treasury out of moneys to be provided by Parliament.

See sections 56, 57, 58, and 59, and the note to section 56, *supra*. See also Order XXXVI., Rules 2, 5, 30, 31, 32, 33 and 34 of the first Schedule to the Supreme Court of Judicature Act, 1875.

SECTION 84.—*Duties, appointment, and removal of officers of Supreme Court.*

Subject to the provisions in this Act contained with respect to existing officers of the Courts whose jurisdiction is hereby transferred to the Supreme Court, there shall be attached to the Supreme Court such officers as the Lord Chancellor with the concurrence of the Presidents of the Divisions of the High Court of Justice, or the major part of them, of which majority the Lord Chief Justice of England shall be one, and with the sanction of the Treasury, may from time to time determine.

Such of the said several officers respectively as may be thought necessary or proper for the performance of any special duties, with respect either to the Supreme Court generally, or with respect to the High Court of Justice or the Court of Appeal, or with respect to any one of the Divisions of the said High Court, or with respect to any particular Judge or Judges of either of the said Courts, may, by the same authority, and with the like sanction as aforesaid, be attached to the said respective Courts, Divisions, and Judges accordingly.

All officers assigned to perform duties with respect to the Supreme Court generally, or

attached to the High Court of Justice or the Court of Appeal, and all Commissioners to take oaths or affidavits in the Supreme Court, shall be appointed by the Lord Chancellor.

All officers attached to the Chancery Division of the said High Court, who have been heretofore appointed by the Master of the Rolls, shall continue, while so attached, to be appointed by the Master of the Rolls.

All other officers attached to any Division of the said High Court shall be appointed by the President of that Division.

All officers attached to any Judge shall be appointed by the Judge to whom they are attached.

Any officer of the Supreme Court (other than such officers attached to the person of a Judge as are hereinbefore declared to be removable by him at his pleasure) may be removed by the person having the right of appointment to the office held by him, with the approval of the Lord Chancellor, for reasons to be assigned in the order of removal.

The authority of the Supreme Court over all or any of its officers may be exercised in and by the said High Court and the said Court of Appeal respectively, and also in the case of officers attached to any Division of the High Court by the President of such Division, with respect to any duties to be discharged by them respectively.

See, as to the provisions of this Act with respect to existing officers of the Courts, whose jurisdiction is transferred by it to the Supreme Court, sections 77, 78, 80, 81, and 82, *supra*. Also see Order LX. of the first Schedule to the Supreme Court of Judicature Act, 1875. As to "Commissioners to take Oaths," see sections 79 and 82, *supra*. "Officers removable at pleasure:" see section 79, *supra*.

SECTION 85.—*Salaries and pensions of officers.*

There shall be paid to every official Referee and other salaried officer appointed in pursuance of this Act such salary out of moneys to be provided by Parliament as may be determined by the Treasury with the concurrence of the Lord Chancellor.

An officer attached to the person of a Judge shall not be entitled to any pension or compensation in respect of his retirement from or the abolition of his office, except so far as he may be entitled thereto independently of this Act; but every other officer to be hereafter appointed in pursuance of this part of this Act, and whose whole time shall be devoted to the duties of his office, shall be deemed to be employed in the permanent Civil Service of Her Majesty, and shall be entitled, as such, to a pension or compensation in the same manner, and upon the same terms and conditions, as the other permanent civil servants of Her Majesty are entitled to pension or compensation.

"An officer attached to the person of a Judge shall not be entitled to any pension." See now as to existing

Chamber Clerks, section 35 of the Supreme Court of Judicature Act, 1875, framed by the Attorney-General upon a new clause of the writer.

“Permanent Civil Servants.” By section 79, *supra*, the duties of Chamber Clerks (other than the existing Chamber Clerks) shall be performed by officers of the Court in permanent civil service of the Crown.

SECTION 86.—*Patronage not otherwise provided for.*

Subject to provisions hereinbefore contained, any rights of patronage and other rights or powers incident to any Court, or to the office of any Judge of any Court whose jurisdiction is transferred to the said High Court of Justice, or to the said Court of Appeal, in respect of which rights of patronage or other rights or powers no provision is or shall be otherwise made by or under the authority of this Act, shall be exercised as follows, that is to say: if incident to the office of any existing Judge, shall continue to be exercised by such existing Judge during his continuance in office as a Judge of the said High Court or of the Court of Appeal, and after the death, resignation, or removal from office of such existing Judge shall be exercised in such manner as Her Majesty may by Sign Manual direct.

This is one of the transition clauses of this Act. “Subject to the provisions hereinbefore contained,” refers to the preceding sections of this Part—Part V— of the Act.

SECTION 87.—*Solicitors and Attorneys.*

From and after the commencement of this

Act all persons admitted as Solicitors, Attorneys, or Proctors of or by law empowered to practise in any Court, the jurisdiction of which is hereby transferred to the High Court of Justice or the Court of Appeal, shall be called Solicitors of the Supreme Court, and shall be entitled to the same privileges and be subject to the same obligations; so far as circumstances will permit, as if this Act had not passed; and all persons who from time to time, if this Act had not passed, would have been entitled to be admitted as Solicitors, Attorneys, or Proctors of or been by law empowered to practise in any such Courts, shall be entitled to be admitted and to be called Solicitors of the Supreme Court, and shall be admitted by the Master of the Rolls, and shall, as far as circumstances will permit, be entitled as such Solicitors to the same privileges and be subject to the same obligations as if this Act had not passed.

Any Solicitors, Attorneys, or Proctors to whom this section applies shall be deemed to be officers of the Supreme Court; and that Court, and the High Court of Justice, and the Court of Appeal respectively, or any Division or Judge thereof, may exercise the same jurisdiction in respect of such Solicitors or Attorneys as any one of Her Majesty's Superior Courts of Law or Equity might previously to the passing of this Act have exercised in respect of any Solicitor or Attorney admitted to practise therein.

This is one of the transition clauses of this Act. No provision is made in this section for adapting the enactments relating to the registration, &c., of Attorneys to the changes introduced by it. In 1874 the writer, at the instance of the Secretary of the Incorporated Law Society, placed an amendment on the notice paper of the House of Commons to remedy this omission. It has since been remedied by the 14th Section of the Supreme Court of Judicature Act, 1875. The effect of the omission was considered to be that no person could be registered as an Attorney after the commencement of the Act. The term "Solicitor," used as a synonym for "Attorney," is at least as old as the reign of Queen Elizabeth. In 1574 we find amongst the "Orders for the Government of the Inns of Court" one to the effect that "if any hereafter admitted in Court practise as Attorneys *or Solicitors* they shall be dismissed and expelled out of their Houses thereupon."* The term "Attorney" simply is as old as the Norman Conquest. There is, no doubt, some confusion in the minds of persons superficially acquainted with the use of the latter term in the Year-Books and other mediæval repositories of legal lore between an Attorney simply and an Attorney-at-law. An Attorney was not a lawyer, but a substitute, in the old law books. A father might appoint his son his Attorney, a wife her husband, a convent its abbot or prior; the expression "appear by Attorney" meant simply the substitution for the party in the cause of another person to act in his turn, or stead, in his absence. This sense of the word "Attorney" is still preserved in the expression, "Power of Attorney"—a power to enable one person to represent another in his absence. It is beside the purpose of this book to trace how Attorneys eventually became Attorneys-at-law.† The term having been introduced originally in reference to the Common Law Courts before the Court of Chancery sprang into power, the new expression "Solicitor" was adopted in the time of the Tudors to denote an Attorney-at-law who practised in the

* Dugdale's "Origines," p. 312.

† Any one who wishes to pursue the subject, which is a rather abstruse one, will find all the authorities collected in "The Legal Profession," published by Ridgway, 169, Piccadilly.

Chancery Courts. The term "Solicitor of the Supreme Court" will henceforth be the style of Attorneys-at-law and Solicitors alike.

PART VI.

JURISDICTION OF INFERIOR COURTS.

SECTION 88.—*Power by Order in Council to confer jurisdiction on inferior Courts.*

It shall be lawful for Her Majesty from time to time by Order in Council to confer on any inferior Court of civil jurisdiction the same jurisdiction in Equity and in Admiralty, respectively, as any County Court now has, or may hereafter have; and such jurisdiction, if and when conferred, shall be exercised in the manner by this Act directed.

The expression "any inferior Courts of civil Jurisdiction" would include such Courts as the Salford Hundred Court of Record and the Passage Court at Liverpool. The section, however, would embrace Courts of inferior jurisdiction which are not Courts of Record. The Acts which confer Equity Jurisdiction on County Courts are the 28 and 29 Viet., c. 99; 30 and 31 Viet., c. 142. The Acts which confer on County Courts Admiralty Jurisdiction are the 31 and 32 Viet., c. 71, and 32 and 33 Viet., c. 51.

By section 45, *supra*, appeals from County Courts are to be brought to Divisional Courts of the High Court of Justice, instead of being brought to three or four district appellate tribunals.

SECTION 89.—*Powers of inferior Courts having Equity and Admiralty jurisdiction.*

Every inferior Court which now has or which

may after the passing of this Act have jurisdiction in Equity, or at Law and in Equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice.

The Judicature Commission thus expatiates, in its First Report,* on the evils of the old system in County Courts :—

“The present state of the County Courts may be appropriately referred to, as exhibiting the strange working of a system of separate jurisdictions, even when exercised by the same Court.

The County Court has jurisdiction in Common Law cases, up to 50*l.* in contracts, and to 10*l.* in torts. It has also equitable jurisdiction in certain cases when the value of the property in dispute does not exceed 500*l.*, and in at least one of such cases, namely, an administration suit, it is now competent for any County Court Judge to restrain the prosecution of actions brought by creditors in any of the Superior Courts of Common Law. By an Act of Parliament of last session some of the County Courts have also been invested with Admiralty jurisdiction in a large class of cases, where the amount in dispute does not exceed, in some cases 150*l.*, and in others 300*l.* There is an appeal in each class of

cases, within certain limits, to a Court of Common Law, to the Court of Chancery, or to the Court of Admiralty. But these jurisdictions, though conferred on the same Court and the same Judge, still remain (like the Common Law and Equity sides of the old Court of Exchequer) quite distinct and separate. The Judge has no power to administer in one and the same suit any combination of the different remedies which belong to his three jurisdictions, however convenient or appropriate such redress may be. That can only be accomplished, under the County Court system, by three distinct suits brought in the same Court and before the same Judge, carried on under three different forms of procedure, and controlled by three different Courts of Appeal. In this case, therefore, although we appear at first sight to have obtained the great desideratum, which the Common Law Commissioners call ‘the consolidation of all the elements of a complete remedy in the same Court,’ yet, as that remedy can only be had in three separate suits, the evil is equally great.”

The object of Part VI. is to enable inferior Courts within their local and limited jurisdictions, to give the same complete relief to their suitors, *mutatis mutandis*, as the Supreme Court, within its wide sphere. This seems all the more necessary now that the appeals from County Courts lie under this Act, and appeals from inferior Courts of Record will lie under s. 15 of the Amending Act, to the High Court of Justice. If the practice below be not assimilated to that above, how can the appeals be satisfactorily heard?

SECTION 90.—*Counter claims in inferior Courts, and transfers therefrom.*

Where in any proceeding before any such inferior Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or the duty of the

Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim: Provided always, that in such case it shall be lawful for the High Court, or any Division or Judge thereof, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from such inferior Court to the High Court, or to any Division thereof; and in such case the record in such proceeding shall be transmitted by the Registrar, or other proper officer, of the inferior Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein.

The proceedings will be removed, it is to be presumed, by *certiorari*.

SECTION 91.—*Rules of law to apply to inferior Courts.*

The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in England, so far as the matters to which such Rules relate shall be respectively cognizable by such Courts.

This section appears to have been added *ex abundanti cautela*. As, however, s. 24, *supra*, is expressly limited to

the "causes and matters commenced in the High Court of Justice," and the preamble to s. 25 alleges as a reason for the rules which it lays down, the expediency of taking advantage of the union of the Superior Courts to amend the law, it might have been contended, especially in view of the provisions of this part of the Act, that the 24th and 25th sections only applied to the Supreme Court, an interpretation which, if adopted, must have led to some curious and far from satisfactory results.

PART VII.

MISCELLANEOUS PROVISIONS.

SECTION 92.—*Transfer of Books and Papers to Supreme Court.*

All books, documents, papers, and chattels in the possession of any Court, the jurisdiction of which is hereby transferred to the High Court of Justice or to the Court of Appeal, or of any officer or person attached to any such Court, as such officer, or by reason of his being so attached, shall be transferred to the Supreme Court, and shall be dealt with by such officer or person in such manner as the High Court of Justice or the Court of Appeal may by order direct; and any person failing to comply with any order made for the purpose of giving effect to this section shall be guilty of a contempt of the Supreme Court.

This section would apply to, *e.g.*, the debt attachment book mentioned in section 66 of the Common Law Procedure Act, 1854, and again in Order XLV, Rule 9, of the first Schedule to the Supreme Court of Judicature Act, 1875.

SECTION 93.—*Saving as to Circuits, &c.*

This Act, except as herein is expressly directed, shall not, unless or until other commissions are issued in pursuance thereof, affect the circuits of the Judges or the issue of any Commissions of Assize, Nisi Prius, Oyer and Terminer, Gaol Delivery, or other commissions for the discharge of civil or criminal business on circuit or otherwise, or any patronage vested in any Judges going circuit, or the position, salaries or duties of any officers transferred to the Supreme Court who are now officers of the Superior Courts of Common Law, and who perform duties in relation to either the civil or criminal business transacted on circuit.

The words "except as herein is expressly directed" refer to section 68, subsection (2), *supra*, now repealed by section 33 and the second Schedule to the Amending Act. Section 23 of the Amending Act contains elaborate provisions for the regulation of circuits.

SECTION 94.—*Saving as to Lord Chancellor.*

This Act, except so far as herein is expressly directed, shall not affect the office or position of Lord Chancellor; and the officers of the Lord Chancellor shall continue attached to him in the same manner as if this Act had not passed; and all duties, which any officer of the Court of Chancery may now be required to perform in aid of any duty whatsoever of the Lord Chancellor,

may in like manner be required to be performed by such officer when transferred to the Supreme Court, and by his successors.

This is one of the transition clauses of this Act. "Except so far as herein is expressly directed," appears to point to the adjustment of the position of the Lord Chancellor in the High Court and Court of Appeal as originally planned by this Act.

SECTION 95.—*Saving as to Chancellor of Lancaster.*

This Act, except so far as is herein expressly directed, shall not affect the offices, position, or functions of the Chancellor of the County Palatine of Lancaster.

The words "except so far as is herein expressly directed," refer to section 78 of the present Act, *supra*.

SECTION 96.—*Saving as to Chancellor of the Exchequer and Sheriffs.*

The Chancellor of the Exchequer shall not be a Judge of the High Court of Justice, or of the Court of Appeal, and shall cease to exercise any judicial functions hitherto exercised by him as a Judge of the Court of Exchequer; but save as aforesaid he shall remain in the same position as to duties and salary, and other incidents of his office, as if this Act had not passed. The same order and course with respect to the appointment of sheriffs shall be used and observed in the Exchequer Division of the said High Court as

has been heretofore used and observed in the Court of Exchequer.

It seems rather extraordinary to enact that "the Chancellor of the Exchequer shall not be a Judge," but a reference to Madox will show that he was regarded as one of the Barons of the Exchequer. There is a curious entry in Madox's list of Barones Scaccarii, *Anno LI,** Hen. III, from which the inference may be drawn very fairly that the *only* Barons of the Exchequer in that year were the Lord Treasurer and the Chancellor of the Exchequer. On entering on his office the Chancellor of the Exchequer took an oath that he would seal with the Exchequer seal no *judicial writ* of any other Court besides the Exchequer while the Lord Chancellor was within twenty miles of the place †where the Exchequer was holden.‡ The Chancellor of the Exchequer is sometimes spoken of as the Treasurer's Deputy,§ sometimes as an officer appointed by the King to keep a sharp look out over him.||

Mr. Gladstone is, it is believed, the last Chancellor of the Exchequer who has sat in that Court, but possibly Mr. Lowe may have done so. The robe worn on such occasions is a very splendid one.

The Judges, &c., nominate three persons, as sheriffs, for each county, in the Exchequer. Black Comm. 341; Bac. Abr. c.

SECTION 97.—*Saving as to Lord Treasurer and office of the Receipt of Exchequer.*

Nothing in this Act contained shall affect the office of Lord Treasurer, except that any Lord Treasurer shall not hereafter exercise any judicial functions hitherto exercised by him as a Judge of the Court of Exchequer; and nothing in this

* 2 Madox's Exchequer, p. 319, citing Mich. Memor., 51 Hen. III., Rot. 2, b.

† The Exchequer then followed the King's person.

‡ Lib. Rub. Scacc., fol. 14 b., 2 Madox, 54.

§ 1 Madox, 291.

|| 2 Madox, 51.

Act shall affect the office of the Receipt of the Exchequer.

The Treasury has been so long in commission that the very name of the "Lord Treasurer" has become obsolete. It is necessary to ransack the laborious pages of Madox to find out what "judicial functions" the Lord Treasurer exercised.

He was one of the Barons, originally, of the Exchequer, and seems to have regularly sat with them.

In the list of "Barones Scaccarii" the name of the Thesaurarius repeatedly occurs. Indeed he may be regarded in some sense as having been Chief Baron, for close writs were addressed, "to the Treasurer and Barons of the Exchequer." He attested the writs issued for levying the King's revenue, directed the entries made in the great roll, and, in a word, "took care of the King's profit," the doing of which frequently involved the exercise of judicial functions.

In the 18th year of Edward 1st, the Treasurer was associated with the Justices of the King's Bench in determining causes.*

"The receipt of the Exchequer." See 4 and 5 Will. IV, c. 15.

SECTION 98.—*Provisions as to Great Seal being in commission.*

When the Great Seal is in commission, the Lords Commissioners shall represent the Lord Chancellor for the purposes of this Act, save that as to the Presidency of the Court of Appeal, and the appointment or approval of officers, or the sanction to any order for the removal of officers, or any other act to which the concurrence or presence of the Lord Chancellor is hereby made

* Et dictum est Justiciariis de Banco, quod, associato sibi Thesaurario et vocatis partibus, faciant quod de jure fuerit faciendum. Ryl. Pl. Parl. 16, 17, anno 18 E. I; 2 Madox, 44.

necessary, the powers given to the Lord Chancellor by this Act may be exercised by the Senior Lord Commissioner for the time being.

Some confusion might have arisen if the whole of the Commissioners had been entitled to have a voice in the decision of cases. The equity element would have been proportionately increased

SECTION 99.—*Provision as to Commissions in Counties Palatine.*

From and after the commencement of this Act, the Counties Palatine of Lancaster and Durham shall respectively cease to be Counties Palatine, so far as respects the issue of Commissions of Assize, or other like Commissions, but not further or otherwise; and all such Commissions may be issued for the trial of all causes and matters within such counties respectively in the same manner in all respects as in any other counties of England and Wales.

See s. 78, *supra*, and also the Order in Council of 12th August, 1875, *infra*.

SECTION 100.—*Interpretation of Terms.*

In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned shall have, or include, the meanings following; (that is to say,)

“Lord Chancellor” shall include Lord Keeper of the Great Seal.

“The High Court of Chancery” shall include the Lord Chancellor.

“The Court of Appeal in Chancery” shall include the Lord Chancellor as a Judge on Re-hearing or Appeal.

“London Court of Bankruptcy” shall include the Chief Judge in Bankruptcy.

“The Treasury” shall mean the Commissioners of Her Majesty’s Treasury for the time being, or any two of them.

“Rules of Court” shall include forms.

“Cause” shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown.

“Suit” shall include action.

“Action” shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court; and shall not include a criminal proceeding by the Crown.

“Plaintiff” shall include every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

“Petitioner” shall include every person making any application to the Court, either by

petition, motion, or summons, otherwise than as against any defendant.

“Defendant” shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings.

“Party” shall include every person served with notice of, or attending any proceeding, although not named on the Record.

“Matter” shall include every proceeding in the Court not in a cause.

“Pleading” shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant.

“Judgment” shall include decree.

“Order” shall include rule.

“Oath” shall include solemn affirmation and statutory declaration.

“Crown cases reserved” shall mean such questions of law reserved in Criminal Trials as are mentioned in the Act of the eleventh and twelfth years of Her Majesty’s reign, chapter seventy-eight.

“Pension” shall include retirement and superannuation allowance.

“Existing” shall mean existing at the time appointed for the commencement of this Act.

By Order LXII. of the first Schedule to the Supreme Court of Judicature Act, 1875, it is provided that the provisions of this section shall apply to the Rules contained in that Schedule.

As to the 11 and 12 Vict., c. 78, see s. 47, *supra*. The only section to which the definition of "Crown cases reserved" applied was the 71st, and it has been repealed, so that the definition may be considered as having been repealed as far as this Act is concerned; but s. 19 of the Amending Act re-enacts s. 71 of this Act, and that Act is to be construed as one with this Act; so that this definition applies to s. 19 of the Amending Act.

RULES UNDER THE SUPREME

SCHEDULE.

RULES OF PROCEDURE.

“The whole of the Schedule” is repealed by section 33 and the second Schedule to the Supreme Court of Judicature Act, 1875, but is re-enacted, almost word for word, in the first Schedule to the same Act. For the purpose of comparison, the present Schedule has been retained, like the other repealed parts of this Act, and the corresponding provisions of the first Schedule to the Supreme Court of Judicature Act, 1875, have been carefully noted under each Rule. The notes appended to the Rules of the present Schedule will enable the legal practitioner or law student, who has mastered the Rules of 1874, and the Schedule to the Act of 1873, to work them in together, in the luminous order of the first Schedule to the Act of 1875.

FORM OF ACTION.

Form of Action in High Court.

1. *All actions which have hitherto been commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which have hitherto been commenced by bill or information in the High Court of Chancery, or by a cause in rem or in personam in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action.*

All other proceedings in and applications to the High Court may, subject to Rules of Court, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if this Act had not passed.

This Rule is re-enacted,—the first clause by Order I, Rule 1

* This has been a work of more labour than might at first sight appear, as the present Schedule is destitute of any symmetrical arrangement, and its *disjecta membra* can only be found, after diligent search, scattered up and down among the Rules of Court drawn up in 1874 under the present Act.

of the Amending Act, the second clause by Order VII, Rule 3 of that Act.

WRIT OF SUMMONS.

Actions to be commenced by Writ.

2. *Every action in the High Court shall be commenced by a writ of summons, which shall be endorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which shall specify the Division of the High Court to which it is intended that the action should be assigned.*

This Rule is re-enacted by Order II, Rule 1 of the Amending Act.

Form of Writ.

3. *[Forms of writs and of endorsements thereon, applicable to the several ordinary causes of action, shall be prescribed by Rules of Court, and] any costs incurred by the use of any more prolix or other forms shall be borne by the party using the same, unless the Court shall otherwise direct.*

This Rule (except the part enclosed in brackets) is re-enacted by Order II, Rule 2 of the Amending Act. "Occasioned" is also substituted in that enactment for "incurred."

Acceptance of Service.

4. *No service of writ will be required when the defendant, by his solicitor, agrees to accept service, and enters an appearance.*

This Rule is re-enacted by Order IX, Rule 1 of the Amending Act.

Service of Writ.

5. *When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the Court or to a Judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or Judge may make such order for substituted or other service, or for the substitution of notice for service, as may seem just.*

This Rule is re-enacted by Order IX, Rule 2 of the Amending Act. See Order X, also of that Act.

Service out of the jurisdiction.

6. *Whenever it appears fit to the Court or to a Judge in a case in which the cause of action has arisen within the jurisdiction, or is properly cognizable against a defendant within the jurisdiction, that any person out of the jurisdic-*

tion of the Court should be served with the writ or other process of the Court, the Court or Judge may order such service, or such notice in lieu of service, to be made or given in such manner and on such terms as may seem just.

See, as to the subject-matter of this Rule, Order XI, Rules 1 to 5 of the Amending Act. It is one of the few Rules not expressly re-enacted. The substituted provisions define the cases in which service out of the jurisdiction may take place, and the conditions under which it is to be made.

Special endorsement of particulars of debts or liquidated demands.

See C. L. P. Act, 1852, ss. 25, 27.

7. *In all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money, payable by the defendant, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, or on a trust, the writ of summons may be specially endorsed with the particulars of the amount sought to be recovered, after giving credit for any payment or set-off.*

In case of non-appearance by the defendant where the writ of summons is so specially endorsed, the plaintiff may sign final judgment for any sum not exceeding the sum endorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, but it shall be lawful for the Court or a judge to set aside or vary such judgment upon such terms as may seem just.

Where the defendant appears on a writ of summons so specially endorsed, the plaintiff may, on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action, call on the defendant to show cause before the Court or a Judge why the plaintiff should not be at liberty to sign final judgment for the amount so endorsed, together with interest, if any, and costs; and the Court or Judge may, unless the defendant, by affidavit or otherwise, satisfy the Court or Judge that he has a good defence to the action on the merits, or disclose such facts as the Court or Judge may think sufficient to entitle him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly. Permission to defend the action may be granted to the defendant on such terms and conditions, if any, as the Judge or Court may think just.

This Rule is re-enacted,—the first clause by Order III, Rule 6, the second clause by Order XIII, Rule 3, and the

third clause (except the last sentence) by Order XIV, Rule 1, of the Amending Act. The last sentence of the third clause is re-enacted by Order XIV, Rule 6.

Special endorsement of particulars in cases of account.

8. *In all cases of ordinary account, as, for instance, in the case of a partnership or executorship or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be endorsed with a claim that such account be taken.*

In default of appearance on such summons, and after appearance, unless the defendant, by affidavit or otherwise, satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases, shall be forthwith made.

This Rule is re-enacted, clause 1 by Order III, Rule 8, and clause 2 by Order XV, Rule 1, of the Amending Act.

PARTIES.

Mis-joinder or non-joinder of parties.

9. *No action shall be defeated by reason of the mis-joinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, in the manner prescribed by Rules of Court, and on such terms as may appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined, be struck out, and that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent thereto. All parties whose names are so added as defendants shall be served with a summons or notice in such manner as may be prescribed by Rules of Court, or by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice.*

This Rule is re-enacted by Order XVI, Rule 13, of the Amending Act.

Representation of parties having same interest.

10. *Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised*

by the Court to defend in such action, on behalf or for the benefit of all parties so interested.

This Rule is re-enacted by Order XVI, Rule 9, of the Amending Act.

11. *Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms, if any ; and any party to an action may in such case apply by summons to a Judge in Chambers for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the Judge may direct.*

This Rule is re-enacted by Order XVI, Rule 10, of the Amending Act. See Order XI, Rule 12, of the Amending Act.

Power to determine questions as against third parties.

12. *Where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appears to the Court or a Judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the Court or a Judge may on notice being given to such last-mentioned person, in such manner and form as may be prescribed by Rules of Court, make such order as may be proper for having the question so determined.*

This Rule is re-enacted by Order XV, Rule 17, of the Amending Act.

Provision for case of doubt as to proper parties.

13. *Where in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as may be prescribed by Rules of Court, or by any special order, join two or more defendants, to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action.*

This Rule is re-enacted by Order XVI, Rule 6, of the Amending Act.

Trustees, executors, &c.

14. *Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the*

action ; but the Court or a Judge may, at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition to or in lieu of the previously existing parties thereto.

This Rule is re-enacted by Order XVI, Rule 7, of the Amending Act.

Actions by married women and infants.

15. *Married women and infants may respectively sue as plaintiffs by their next friends, in the manner practised in the Court of Chancery before the passing of this Act ; and infants may, in like manner, defend any action by their guardians appointed for that purpose. Married women may also, by the leave of the Court or a Judge, sue or defend without their husbands and without a next friend, on giving such security (if any) for costs as the Court or a Judge may require.*

This Rule is re-enacted by Order XVI, Rule 8, of the Amending Act.

Parties where there are several liabilities on the same contract.

16. *The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes.*

This Rule is re-enacted by Order XVI, Rule 5, of the Amending Act.

Abatement.

17. *An action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title pendente lite.*

In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to an action, the Court or Judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party to the action, or be served with notice thereof in such manner and form as may be prescribed by Rules of Court, and on such terms as the Court or Judge shall think just, and shall make such order for the disposal of the action as may be just.

In case of an assignment, creation, or devolution of any estate or title pendente lite, the action may be continued by or against the person to or upon whom such estate or title has come or devolved.

The first clause of this Rule is re-enacted by Order L, Rule 1,

of the Amending Act; the second clause by Order L, Rule 2 of that Act; and the third clause by Order L, Rule 3 of the same Act.

PLEADINGS.

Form of pleadings.

18. *The following rules of pleading shall be substituted for those heretofore used in the High Court of Chancery and in the Courts of Common Law, Admiralty, and Probate.*

Unless the defendant at the time of his appearance shall state that he does not require the delivery of a statement of complaint, the plaintiff shall within such time and in such manner as shall be prescribed by Rules of Court, file and deliver to the defendant after his appearance a printed statement of his complaint and of the relief or remedy to which he claims to be entitled. The defendant shall within such time and in such manner as aforesaid file and deliver to the plaintiff a printed statement of his defence, set-off, or counter-claim (if any), and the plaintiff shall in like manner file and deliver a printed statement of his reply (if any) to such defence, set-off, or counter-claim. Such statements shall be as brief as the nature of the case will admit, and the Court in adjusting the costs of the action shall inquire at the instance of any party into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same.

A demurrer to any statement may be filed in such manner and form as may be prescribed by Rules of Court.

The Court or a Judge may, at any stage of the proceedings, allow either party to alter his statement of claim or defence or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties.

The first clause of this Rule is re-enacted by Order XIX, Rule 1, of the Amending Act. The second clause is re-enacted by Order XIX, Rule 2 of that Act. The fourth clause is re-enacted by Order XXVII, Rule 1 of the same Act. The third clause is the only one relating to demurrers in the Schedule to the Principal Act. Ample provisions relating to demurrers will be found in Order XXVIII of the Amending Act.

Power to settle issues.

19. *Where in any action it appears to a Judge that the statement of claim or*

defence or reply does not sufficiently disclose the issues of fact in dispute between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the Judge.

This Rule is re-enacted by Order XXVI of the Amending Act.

Counter-claims by defendant.

20. *A defendant may set off, or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.*

This Rule is re-enacted by Order XIX, Rule 3, of the Amending Act.

Power to give judgment for defendant for balance under counter-claim.

21. *Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.*

This Rule is re-enacted by Order XXII, Rule 10, of the Amending Act.

Joinder of several causes of action.

22. *Subject to any Rules of Court, the plaintiff may unite in the same action and in the same statement of claim several causes of action, but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.*

This Rule is re-enacted by Order XVII, Rule 1, of the Amending Act.

23.* *It shall not be necessary that every defendant to any action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or a Judge may make such order as may*

* This Rule has no marginal note.

appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in such action in which he may have no interest.

This Rule is re-enacted by Order XVI, Rule 4, of the Amending Act.

Power for Court to raise preliminary questions of law in an action.

24. *If it appear to the Court or a Judge, either from the statement of claim or defence or reply or otherwise, that there is in any action a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a Referee or an Arbitrator, the Court or Judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or Judge may deem expedient, or as may be prescribed by Rules of Court, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.*

This Rule is re-enacted by Order XXXIV, Rule 2, of the Amending Act.

DISCOVERY.

Right of discovery on interrogatories.

25. *Subject to any Rules of Court, a plaintiff in any action shall be entitled to exhibit interrogatories to, and obtain discovery from, any defendant, and any defendant shall be entitled to exhibit interrogatories to, and obtain discovery from, a plaintiff or any other party. Any party shall be entitled to object to any interrogatory on the ground of irrelevancy, and the Court or a Judge, if not satisfied that such interrogatory is relevant to some issue in the cause, may allow such objection. No exceptions shall be taken to any answer, but the sufficiency or otherwise of any answer objected to as insufficient shall be determined by the Court or a Judge in a summary way.*

The Court in adjusting the costs of the action shall at the instance of any party inquire or cause inquiry to be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing master or of the Court or Judge that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault.

This Rule is re-enacted, the third clause by Order XXXI, Rule 9, the fourth clause by Order XXXI, Rule 2, the first clause (substantially) by Order XXXI, Rule 1, and the second clause (substantially) by Order XXXI, Rule 5, of the Amending Act.

Production of documents pleaded or proved.

26. Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice.

This Rule is re-enacted by Order XXXI, Rule 14, of the Amending Act.

Discovery as to documents.

27. It shall be lawful for the Court or a Judge at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit or proceeding, as the Court or Judge shall think right; and the Court may deal with such documents when produced, in such manner as shall appear just.

This Rule is re-enacted by Order XXXI, Rule 11, of the Amending Act.

PLACE OF TRIAL.

Place of Trial.

28. There shall be no local venue for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in *Middlesex*, he shall in his statement of claim name the county or place in which he proposes that the action shall be tried, and the action shall, unless a Judge otherwise orders, be tried in the county or place so named. Where no place of trial is named in the statement of claim, the place of trial shall, unless a Judge otherwise orders, be the county of *Middlesex*. Any order of a Judge as to such place of trial, may be discharged or varied by a Divisional Court of the High Court.

This Rule is re-enacted by Order XXXVI, Rule 1, of the Amending Act.

List for trials in London and Middlesex.

29. The list or lists of actions for trial at the sittings in London and *Middlesex* respectively shall be prepared and the actions shall be allotted for trial in such manner as may be prescribed by Rules of Court, without reference to the division of the High Court to which such actions may be attached.

This Rule is re-enacted by Order XXXVI, Rule 16, of the Amending Act.

MODE OF TRIAL.

Mode of trying actions.

30. *Actions shall be tried and heard either before a Judge or Judges, or before a Judge sitting with assessors, or before a Judge and Jury, or before an official or special Referee, with or without assessors.*

This Rule is re-enacted by Order XXXVI, Rule 2, of the Amending Act.

Notice of mode of trial to be given.

31. *The plaintiff may give notice of trial by any of the modes aforesaid, but the defendant may, upon giving notice, within such time as may be fixed by Rules of Court, that he desires to have any issues of fact tried before a Judge and Jury, be entitled to have the same so tried, or he may apply to the Court or a Judge for an order to have the action tried in any other of the said ways, and in such case the mode in which the action is to be tried or heard shall be determined by such Court or Judge.*

This Rule is (substantially) reproduced by Rules 3 and 4 of Order XXXVI of the Amending Act.

Different questions arising in same action may be tried in different ways.

32. *In any action the Court or a Judge may, at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials.*

This Rule is re-enacted by Order XXXVI, Rule 6, of the Amending Act.

Trials by jury.

33. *Every trial of any question or issue of fact by a jury shall be held before a single Judge, unless such trial be specially ordered to be held before two or more Judges.*

This Rule is re-enacted by Order XXXVI, Rule 7, of the Amending Act.

Proceedings before an official Referee.

34. *Where an action or matter, or any question in an action or matter, is referred to a Referee, he may, subject to the order of the Court or a Judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the Court or a Judge, proceed*

with the trial in open Court, de die in diem, in a similar manner as in actions tried by a jury.

This Rule is re-enacted by Order XXXVI, Rule 30, of the Amending Act.

Effect of decision of Referee.

35. *The Referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially, with power to the Court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the Court may direct; and the Court shall have power to require any explanation or reasons from the Referee, and to remit the action or any part thereof for re-trial or further consideration to the same or any other Referee.*

This Rule is re-enacted by Order XXXVI, Rule 34, of the Amending Act.

EVIDENCE.

Mode of giving evidence at trials.

36. *In the absence of any agreement between the parties, and subject to any Rules of Court applicable to any particular class of cases, the witnesses at the trial of any cause or at any assessment of damages, shall be examined vivâ voce and in open Court, but the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a Commissioner or examiner; provided that where it appears to the Court or Judge that the other party bonâ fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.*

This Rule is re-enacted by Order XXXVII, Rule 1, of the Amending Act.

Evidence at interlocutory applications.

37. *Upon any interlocutory application evidence may be given by affidavit; but the Court or a Judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.*

This Rule is re enacted by Order XXXVII, Rule 2, of the Amending Act.

Matter of affidavits.

38. *Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.*

This Rule is re-enacted by Order XXXVII, Rule 3, of the Amending Act.

Admissions.

39. *Any party to an action may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the statement of claim, defence, or reply of any other party.*

Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the Court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

The first clause of this Rule is re-enacted by Order XXXII, Rule 1, of the Amending Act; the second clause by Order XXXII, Rule 2 of that Act.

The second clause of the Rule is copied *verbatim* from the Common Law Procedure Act, 1852, Section 117.

INTERLOCUTORY ORDERS AND DIRECTIONS.

Power for party to apply for order before termination of action.

40. *Any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to, without waiting for the determination of any other question between the parties.*

This Rule is re-enacted by Order XL, Rule 11 (clause 1), of the Amending Act.

Power to transfer questions arising in actions.

41. *The Lord Chancellor, with the concurrence of the Lord Chief Justice of England, may order any question of law or of fact which may arise in any action or matter to be transferred from any Judge to any other Judge, or to be tried or heard by any other Judge of the said High Court, and may confer*

on such Judge power to deal with the whole or any part of the matters in controversy.

This Rule is substantially reproduced by Order LI, Rules 1 and 2, of the Amending Act.

Accounts and enquiries.

42. *The Court or a Judge may, at any stage of the proceedings in an action or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special matter to be tried, as to which it may be proper that the cause should proceed in the ordinary manner.*

This Rule is re-enacted by Order XXXIII of the Amending Act.

Interim orders as to subject matter of litigation.

43. *When by any contract a prima facie case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured.*

This Rule is re-enacted by Order LII, Rule 1, of the Amending Act.

Power to make orders for sale of goods.

44. *It shall be lawful for the Court or a Judge, on the application of any party to any action, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as to the Court or Judge may seem desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once.*

This Rule is re-enacted by Order LII, Rule 2, of the Amending Act.

Power for Court to make interim orders as to preservation or examination of property, examination of witnesses, &c.

45. *It shall be lawful for the Court or a Judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property, being the subject of such action, and for all or any of the purposes aforesaid to, authorise any person or persons to enter upon or into any land or building in the possession of any party to such action, and for all or any of the purposes aforesaid to*

authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. The Court or a Judge may also, in all cases where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any action or other proceeding to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct.

This Rule is re-enacted, the first clause by Order LII, Rule 3, the second clause by Order XXXVII, Rule 4, of the Amending Act, ("cause or matter" being substituted for "all cases.")

Discontinuance of action.

46. *The plaintiff may, at any time before receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. Such costs shall be taxed in the manner prescribed by Rules of Court, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this Rule otherwise provided, it shall not be competent for the plaintiff to withdraw the Record or discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a Judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave. Any judgment of nonsuit, unless the Court or a Judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise, or accident, any judgment of nonsuit may be set aside on such terms, as to payment of costs and otherwise, as to the Court or a Judge shall seem just.*

This Rule is re-enacted, the last clause by Order XLI, Rule 6, the remainder by Order XXIII of the Amending Act.

COSTS.

Costs.

47. *Subject to the provisions of this Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity.*

This Rule is re-enacted by Order LV of the Amending Act.

NEW TRIALS AND APPEALS.

Restrictions on new trials.

48. *A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only.*

This Rule is re-enacted by Order XXXIX, Rule 3, of the Amending Act.

Abolition of bills of exceptions and proceedings in error.

49. *Bills of exceptions and proceedings in error shall be abolished.*

The Rule is re-enacted by Order LVIII, Rule 1, of the Amending Act.

Mode of Appealing.

50. *All appeals to the Court of Appeal shall be by way of re-hearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the case of such part.*

This Rule is re-enacted by Order LVIII, Rule 2, of the Amending Act.

Notice of appeal.

51. *The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a*

party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may seem just, and may give such judgment and make such order as might have been given or made if the person served with such notice had been originally parties. Any notice of appeal may be amended at any time as to the Court of Appeal may seem fit.

This Rule is re-enacted by Order LVIII, Rule 3, of the Amending Act.

General power of Appeal Court.

52. *The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a decree or judgment upon the merits, at the trial or hearing of any action or matter, such further evidence (save as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court. The Court of Appeal shall have power to give any judgment and make any decree or order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may seem just.*

This Rule is re-enacted by Order LVIII, Rule 5, of the Amending Act.

Regulations as to cross appeals.

53. *It shall not, under any circumstance, be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied or altered, he shall, within such time as may be prescribed by Rules of Court or by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers by this Act conferred upon*

the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs.

This Rule is re-enacted by Order LVIII, Rule 6, of the Amending Act.

Mode of bringing evidence before Court of Appeal.

54. *When any question of fact is involved in an appeal, the evidence taken in the Court below shall be brought before the Court of Appeal in such manner as may be prescribed by Rules of Court or by special order.*

This Rule is re-enacted (with the exception of the words, "in such manner as may be prescribed by Rules of Court or by special order") by Order LVIII, Rule 11 of the Amending Act. The "manner" is laid down in sub-sections (a) and (b) of the last-mentioned Rule.

Power for Court to refer to notes, &c.

55. *If, upon the hearing of an appeal, a question arise as to the ruling or direction of the Judge to a jury or assessors, the Court shall have regard to verified notes or other evidence, and to such other materials as the Court may deem expedient.*

This Rule is re-enacted by Order LVIII, Rule 13, of the Amending Act.

Want of appeal from interlocutory order not to limit powers of Court of Appeal.

56. *No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may seem just.*

This Rule is re-enacted by Order LVIII, Rule 14, of the Amending Act.

Limit of time in appeals.

57. *No appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. The said respective periods shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal, or from such time as may be prescribed by Rules of Court. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as*

may be prescribed by Rules of Court, or directed under special circumstances by the Court of Appeal.

This Rule (except the words “or from such time as may be prescribed by Rules of Court”) is re-enacted by order LVIII, Rule 15, of the Amending Act.

Appeal not to stay proceedings.

58. *An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any Judge thereof, or the Court of Appeal, may so order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct.*

This Rule is re-enacted by Order LVIII, Rule 16, of the Amending Act.

SUPREME COURT OF JUDICATURE ACT, 1875.



38 & 39 VICTORIA, CHAPTER 77.

An Act to amend and extend the Supreme Court of Judicature Act, 1873.

WHEREAS it is expedient to amend and extend the Supreme Court of Judicature Act, 1873.

A Bill was introduced in 1874, entitled "An Act to amend and extend the Supreme Court of Judicature Act, 1873." It passed through the House of Lords and was read a first time in the House of Commons, but it was withdrawn near the close of the Session of 1874, the chief cause of its withdrawal being the occupation of the time, which would otherwise have been devoted to it by measures which were regarded as of more pressing importance, especially by the Public Worship Bill, the Scottish Church Patronage Bill, and the Endowed Schools Bill, all of which eventually became law in the Session of 1874.

Instead of an amending measure a Suspensory Bill was passed (37 and 38 Vict. c. 83) by which the 2nd section of the Supreme Court of Judicature Act, 1873, was repealed and it was provided that that Act "excepting provisions thereof directed to take effect on the passing thereof" should "commence and come into operation on the 1st day of November, 1875," and the said day should "be taken to be the time appointed for the commencement of the said Act."

The preamble of the present Bill is copied from the preamble of the Amending Bill of 1874, with the omission of the concluding words, "and to constitute an Imperial Appellate Court."

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

SECTION 1.—*Short title, and construction with 36 and 37 Vict. c. 66.*

This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Supreme Court of Judicature Act, 1873, (in this Act referred to as the Principal Act,) and together with the Principal Act may be cited as the Supreme Court of Judicature Acts, 1873 and 1875, and this Act may be cited separately as the Supreme Court of Judicature Act, 1875.

This section is copied from the Supreme Court of Judicature Bill of 1874, with the substitution of "1875" for "1874."

"The Supreme Court of Judicature Act, 1873," is the title, as we have seen,* given to the Principal Act by the 1st section of that Act.

SECTION 2.—*Commencement of Act.*

This Act, except any provision thereof which is declared to take effect before the commencement of this Act, shall commence and come into operation on the 1st day of November, 1875.

Sections twenty, twenty-one, and fifty-five of

the Principal Act shall not commence or come into operation until the 1st day of November, 1876, and until the said sections come into operation, an appeal may be brought to the House of Lords from any judgment or order of the Court of Appeal hereinafter mentioned in any case in which any appeal or error might now be brought to the House of Lords or to Her Majesty in Council from a similar judgment, decree, or order of any Court or Judge whose jurisdiction is by the Principal Act transferred to the High Court of Justice or the Court of Appeal, or in any case in which leave to appeal shall be given by the Court of Appeal.

The first paragraph of this section is copied from the Supreme Court of Judicature Bill, 1874. The words, "except any provision thereof which is declared to take effect before the commencement of this Act," refer to the following sections: section 25, *infra* (which enacts that Orders in Council and Rules of Court, required by this Act to be laid before Parliament, shall be so laid within forty days next after they are made); section 29, *infra* (which abolishes certain small payments to the Senior Puisne Judge of the Queen's Bench and to the Queen's Coroner and Attorney); section 30 (which repeals section 16 of the Chancery Funds Act, 1872); Section 31 (which abolishes the office of secretary to the visitors of lunatics), and section 32, (which amends section 19 of the 32 and 33 Vict., c. 83, and section 116 of the 32 and 33 Vict., c. 71). Sections 17, 23, and 26, also, give power to make orders after the passing and before the commencement of the present Act. See also s. 8.

By subsection (5) of the 18th section of the Supreme Court of Judicature Act, 1873, it is enacted,* "that there

* P. 21.

shall be transferred to and vested in the Court of Appeal all jurisdiction vested in or capable of being exercised by Her Majesty in Council, or the Judicial Committee of Her Majesty's Privy Council, upon appeal from any judgment or order of the High Court of Admiralty, or from any order in lunacy made by the Lord Chancellor or any other person having jurisdiction in lunacy."

As to appeals to the Judicial Committee of the Privy Council from the High Court of Admiralty, see the 2 and 3 Wm. IV., c. 92; 3 and 4 Vict. c. 65, s. 17; 24 and 25 Vict. c. 10, s. 32; 27 and 28 Vict., c. 25: 33 and 34 Vict. c. 90, s. 27.

As to appeals to the same Committee from the Lord Chancellor or Lord Justices in Lunacy, see *Sheldon v. Fortescue*, 3 P. Wms., 138; Elmer, 84. "No appeal," says Mr. Daniel,* "lies to the House of Lords from orders made by the Lord Chancellor or Lords Justices in Lunacy. In such case the appeal is to the Privy Council."

The effect of the latter part of the present section is rather curious. The jurisdiction of the High Court of Admiralty is, by the 5th subsection of the 16th section of the Principal Act, vested in the High Court of Justice. The appeal from the High Court of Admiralty lay direct, as we have seen, to the Privy Council. The 5th subsection of the 18th section of the Principal Act vests this appellate jurisdiction of the Privy Council in the new Court of Appeal. Then comes the present section, and says that "an appeal may, till the 1st November, 1876, be brought to the House of Lords *from any judgment or order of the Court of Appeal*, in any case in which any appeal might now be brought to Her Majesty in Council from a similar judgment or order" of the High Court of Admiralty, that being a "Court whose jurisdiction is transferred to the High Court of Justice." Evidently the words "from any judgment or order of the Court of Appeal," and the word "similar," are mere surplusage, unless it is intended to give two appeals, one to the Court of Appeal and one from that Court to the House of Lords, where, before the 1st

* Practice of the High Court of Chancery, c. XXXII, s. 3 (p. 1361, Edn. 1871.)

November, 1875, there was only one appeal, viz. to the Privy Council. The writer understands that such is the intention, with a view to preventing many appeals to the Upper House under this section.

Again, the jurisdiction of the Lord Chancellor and Lords Justices in Lunacy is by subsection (3) of the 17th section of the Principal Act, expressly declared not to be transferred to the High Court of Justice. Prior to the 1st November, 1875, the appeal from the Lord Chancellor and Lords Justices in Lunacy, lay direct to the Privy Council; but subsection (5) of section 18 of the Principal Act substitutes the Court of Appeal for the Privy Council, as the appellate tribunal in this case. Then comes the present section, and says that "an appeal may be brought to the House of Lords from any judgment or order of the Court of Appeal in any case in which any appeal might now be brought to Her Majesty in Council from a similar judgment, or order of any Court or Judge whose jurisdiction is by the Principal Act transferred to the High Court of Justice or the Court of Appeal."

Now, as by the 3rd subsection of the 17th section of the Principal Act it is expressly provided that the jurisdiction of the Lord Chancellor and Lords Justices in Lunacy shall not be transferred to the High Court of Justice, and as that jurisdiction is not transferred by the 5th subsection of the 18th section of the principal Act, the jurisdiction transferred by that enactment being the *appellate* jurisdiction from the Lord Chancellor and the Lords Justices to the Privy Council, it follows, that the present section has no effect at all upon the jurisdiction either of the Lord Chancellor and Lords Justices in Lunacy or of the Privy Council in Lunacy, or of the Court of Appeal in Lunacy, no appeal to Her Majesty in Council lying in this case from a Court or Judge, whose jurisdiction is by the Principal Act transferred to the High Court of Justice or the Court of Appeal. It is the jurisdiction in Lunacy of the Privy Council *itself* which is transferred by the Principal Act to the Court of Appeal. In the debates on this section, no allusion was made to any intention of transferring appeals to the Privy Council from the Lord Chancellor and Lords Justices in Lunacy to the House of Lords,

but only appeals to the Privy Council from the Court of Admiralty, and the writer understands that it was not intended to touch the former. It will be perceived that to make this section applicable, the jurisdiction of the Court from which an appeal lies, must have been "transferred by the Principal Act." If the words, "or this Act," were added, this section and s. 7 would, taken together, vest in the House of Lords an appeal from the Court of Appeal in Lunacy, as far as the jurisdiction in lunacy of the *Lords Justices* is concerned.*

The only amendment made to the present section was on the Report, near the close of the Session, when the words, "or in any case in which leave to appeal shall be given by the Court of Appeal," were added. These words seem to have reference to s. 53 of the Principal Act, which provided a substitute for the appellate jurisdiction of the House of Lords by a "re-hearing" before a greater number of the Judges of the Court of Appeal, "if the Court of Appeal think fit so to direct;" but s. 53 of the Principal Act is repealed by the present Act (s. 33 and Schedule 2), and there is no provision, it is believed, as to "*leave to appeal*" to be given by the Court of Appeal in either of the Judicature Acts.

SECTION 3.—*Explanation of 36 and 37 Vict., c. 66, s. 5, as to number of Judges.*

Whereas by Section five of the Principal Act it is provided as follows: "that if at the commencement of this Act the number of puisne justices and junior barons who shall become Judges of the said High Court shall exceed twelve in the whole, no new Judge of the said High Court shall be appointed in the place of any such puisne justice or junior baron who shall die or resign while such whole number shall ex-

* The present section was criticised with much acerbity in the House of Commons.

“ceed twelve, it being intended that the permanent number of Judges of the said High Court shall not exceed twenty-one;” and whereas, having regard to the state of business in the several courts whose jurisdiction is transferred by the Principal Act to the High Court of Justice, it is expedient that the number of Judges thereof should not at present be reduced: Be it enacted, that so much of the said section as is hereinbefore recited shall be repealed. The Lord Chancellor shall not be deemed to be a permanent Judge of that Court, and the provisions of the said section relating to the appointment and style of the Judges of the said High Court shall not apply to the Lord Chancellor.

See the note (p. 8) to section 5 of the Principal Act, as to two curious *errata* in that section, which this section was originally designed to amend.

The manner in which it was intended to amend s. 5 will appear from the shape in which Clause 3 came down from the House of Lords. It then ran thus:

“Whereas by section five of the principal Act it is provided as follows:—‘that if at the commencement of this Act the number of puisne justices and junior barons who shall become Judges of the said High Court shall exceed twelve in the whole, no new Judge of the said High Court shall be appointed in the place of any such puisne justice or junior baron who shall die or resign while such whole number shall exceed twelve, it being intended that the permanent number of Judges of the said High Court shall not exceed twenty-one;’ and doubts have arisen as to the position of the Lord Chancellor under the said section, and it is expedient to remove such doubts:

“Be it therefore enacted, that the said section shall be read as if instead of the words ‘the permanent number of Judges

of the said High Court' there were inserted the words, 'the number of permanent Judges of the said High Court,' and in the construction of the said section the Lord Chancellor shall be deemed not to be a permanent Judge of the said High Court, but the other Judges constituting the said High Court, exclusive of the Lord Chancellor, shall be deemed to be permanent Judges of that Court, and the provisions of the said section relating to the appointment and style of the Judges of the said High Court shall not apply to the Lord Chancellor."

In Committee on the Bill the consideration of Clause 3 was postponed, till after that of the other clauses.

Eventually the Attorney-General gave notice of the following amendment to the clause :

Page 2, line 5, leave out from (" and ") to (" exclusive of ") in line 14 and insert (" Whereas, having regard to the state of business in the several courts whose jurisdiction is transferred by the Principal Act to the High Court of Justice, it is expedient that the number of Judges thereof should not at present be reduced : Be it enacted, that so much of the said section as is herein-before recited shall be repealed.")

With the exception of Mr. Gladstone and Sir William Harcourt, the hon. members, who spoke in the debates on the Bill, were unanimous in deprecating any reduction in the number of the Judges, as contemplated by the repealed paragraph of section 5 of the Principal Act.

SECTION 4.—*Constitution of Court of Appeal.*

Her Majesty's Court of Appeal, in this Act and in the Principal Act referred to as the Court of Appeal, shall be constituted as follows : There shall be five *ex-officio* Judges thereof, and also so many Ordinary Judges, not exceeding three at any one time, as Her Majesty shall from time to time appoint.

The *ex-officio* Judges shall be the Lord Chan-

cellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer.

The first Ordinary Judges of the said Court shall be the present Lords Justices of Appeal in Chancery, and such one other person as Her Majesty may be pleased to appoint by Letters Patent. Such appointment may be made either before or after the commencement of this Act, but if made before shall take effect at the commencement of the Act.

The Ordinary Judges of the Court of Appeal shall be styled Justices of Appeal.

The Lord Chancellor may by writing addressed to the President of any one or more of the following divisions of the High Court of Justice, that is to say, the Queen's Bench division, the Common Pleas division, the Exchequer division, and the Probate, Divorce, and Admiralty division, request the attendance at any time, except during the times of the spring or summer Circuits, of an additional Judge from such Division, or Divisions (not being *ex-officio* Judge or Judges of the Court of Appeal) at the sittings of the Court of Appeal, and a Judge, to be selected by the Division from which his attendance is requested, shall attend accordingly.

Every Additional Judge, during the time that he attends the sittings of Her Majesty's Court of

Appeal, shall have all the jurisdiction and powers of a Judge of the said Court of Appeal, but he shall not otherwise be deemed to be a Judge of the said Court, or to have ceased to be a Judge of the Division of the High Court of Justice to which he belongs.

Section fifty-four of the Principal Act is hereby repealed, and, instead thereof, the following enactment shall take effect;—No Judge of the said Court of Appeal shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself, or made by any Divisional Court of the High Court of which he was and is a member.

Whenever the office of an Ordinary Judge of the Court of Appeal becomes vacant a new Judge may be appointed thereto by Her Majesty by Letters Patent.

The leading distinction between the Court of Appeal created by the Principal Act and the Court of Appeal created by this Act is as follows:—The Court of Appeal created by the Principal Act was to be, practically, the *sole* Court of Appeal for the British Empire (“the Imperial Court of Appeal,” as it is termed in the Amending Bill of 1874), while the Court of Appeal created by this Act is a much more modest tribunal, representing merely the abolished jurisdiction of the Exchequer Chamber and of the Court of Appeal in Chancery—in other words, it is merely an intermediate Court of Appeal for England. The House of Lords will for the present be the Final Court of Appeal for the United Kingdom, except in Ecclesiastical causes; and the Judicial Committee of the Privy Council will for the present be the Final Court of Appeal in Ecclesiastical causes, and also for our Colonial Empire and India.

It was proposed by the 21st and 55th sections of the

Principal Act that the Court of Appeal, which it created, should gradually absorb the jurisdiction of the Judicial Committee of the Privy Council; but this proposal is, as we have seen, for the present, at least, suspended.

This section is substituted for section 6 of the Principal Act, which is repealed by section 33 of the present Act, and the second Schedule. There is no section of the present Act which underwent more (and more rapid) changes than the section now under discussion.

As the section originally stood, the third paragraph ran as follows:—"The first ordinary Judges of the said Court shall be the present Lords Justices of Appeal in Chancery, *such two of the salaried Judges of the Judicial Committee of Her Majesty's Privy Council appointed under the Judicial Committee Act, 1871, as Her Majesty may, under the Royal Sign Manual appoint,* and such one other person as Her Majesty may be pleased to appoint by Letters Patent. Such appointment may be made either before or after the commencement of this Act, but, if made before shall take effect at the commencement of the Act." The words in italics were omitted in Committee on the Bill in the House of Commons, on the motion of Mr. Gregory, and the word, "three," was at the same time substituted for the word, "one."*

* The following report of the debate of July 5th, 1875, on this question, taken from the *Times* of July 6th, 1875, will explain some of the reasons which induced the Attorney-General (Sir Richard Bagge), to assent to the amendment of the hon. member for Sussex:—

"On Clause 4,

"Mr. W. WILLIAMS moved, page 2, line 29, to leave out after 'Chancery' to end of line 36, and insert, 'and such three other persons to be selected from the Vice-Chancellors, Justices, or Barons of the Superior Courts of Law and Equity at Westminster, or of the corresponding Divisions of the High Court of Justice, of not less than five years' standing as Judges, as Her Majesty may under the Royal Sign Manual appoint.' The plan proposed by the Bill would, in the first place, weaken the efficiency of the Judicial Committee of the Privy Council by taking away two of the Judges to sit in the Intermediate Court; and, in the next place, it amounted to a distinct breach of faith and violation of the understanding on which these learned Judges were appointed to their present offices in 1871. They were appointed to a Final Appellate Court, subject to being available hereafter for a supreme appellate jurisdiction. They were now to be transferred to a Court of Intermediate Appeal, which was not a Court of such high dignity as that from which they were to be removed.

"Mr. FORSYTH trusted that the Attorney-General would remain open

If the fourth section of the present Act had passed in the shape in which it was sent down from the House of Lords, it would have been impossible to have retained the Judicial Committee of the Privy Council, crippled by the loss of

to conviction and would see whether some better tribunal could not be proposed. In the first place, as had been pointed out, the Judicial Committee of the Privy Council would be greatly weakened by withdrawing half their number; next the Intermediate Court would hear appeals from all the Judges of Common Law and Equity. In overruling judgments from the Common Law Courts it ought to have a strong Common Law element; but as the Bill stood there might be five Equity Judges sitting to decide questions of purely common law. Some security ought to be taken that two out of the three 'other persons' should be Common Law lawyers.

"Sir H. JAMES hoped the decision of the Committee would be taken upon the simple question of whether two members of the Judicial Committee of the Privy Council should or should not be chosen as members of the Intermediate Court.

"After a few observations from Mr. GREGORY, Sir H. HOLLAND, and Mr. GOLDNEY.

"Mr. W. WILLIAMS withdrew his amendment in favour of Mr. Gregory's, which raised the real issue in a more clear and simple manner than did his own proposal.

"Mr. GREGORY moved the omission of that part of the clause which provided that two salaried Judges of the Judicial Committee of the Privy Council should be removed to the Supreme Court of Appeal. The Judicial Committee had proved to be a tribunal highly satisfactory to the suitors and the Bar, and its judgments were much respected and looked up to. If that tribunal were weakened, considerable arrears of business would probably accrue. Appeals would be hung up, and consequently their number would increase, because many appeals were made merely for purposes of delay. He hoped no consideration of economy would be allowed to stand in the way of constituting a really efficient Court of Appeal.

"Sir E. WILMOT supported the amendment.

"Mr. LEITH contended that the clause as it stood would bring about the same unfortunate state of things as prevailed in connection with the Judicial Committee of the Privy Council previous to 1871, and supported the amendment, inasmuch as it would maintain the strength of the Judicial Committee unimpaired. He also objected to the clause on the ground that it would be a breach of faith with the Judge to remove them from a higher to a lower Court.

"The ATTORNEY-GENERAL disavowed any intention of breaking faith with the Judges, and stated that at the time of their appointment it was distinctly understood that they were to be available for any Court of Appeal which might be formed. The arrangement made in 1871, he maintained, was of a temporary character in order to meet a temporary difficulty—namely, the accumulation of over 400 appeals. Of these, the four Judges had cleared off no less than 320 (hear, hear); so that at the present time there was no glut of business before the Privy Council at all. Under these circumstances he did not think any difficulty would be created by the proposal in the Bill. At the same time, that was a question

two of its salaried Judges, as a Final Court of Appeal, side by side with the House of Lords. The idea of transferring two of the salaried Judges of the Judicial Committee of the Privy Council to the Court of Appeal was, no doubt, taken from the repealed sixth section of the Principal Act, which provided, that "the first ordinary Judges of the said Court shall be the existing Lord Justices of Appeal in Chancery, the existing salaried Judges of the Judicial Committee of Her Majesty's Privy Council appointed under 'the Judicial Committee Act, 1871' and such three other persons as Her Majesty may be pleased to appoint by Letters Patent."

When the Bill was in Committee in the House of Commons, Sir Henry James made an effort to secure that the "three other persons" should be Common Law Judges from Westminster Hall, but the proposal was resisted by the Attorney-General, and was not pressed.

The present section, when the Bill issued from Committee in the House of Commons, stood as follows:—*

which ought to be solved in a manner that was likely to inspire general confidence. There was no doubt that an opinion had been expressed very decidedly by the legal members on both sides of the House that it was not desirable to constitute that Court of Appeal in part by the removal of two members of the Judicial Committee at the present time. (Hear, hear.) It had appeared to him that they might have been placed in that Court of Appeal with advantage and economy. He was not one of those who would allow considerations of economy to prevail where they stood in the way of efficiency; but, believing that the Judges of the Judicial Committee would still be able to discharge the duties imposed upon them in an efficient manner, he thought it would have been desirable that the economical arrangement which had been proposed should have been adopted. Yet he did not think he ought to stand out against the view which had been almost universally expressed by the Committee that evening, and he was disposed therefore to accede to the proposal of the hon. member for Sussex (Mr. Gregory), and to omit the names of the two Privy Council Judges from the clause. (Hear, hear.) Although any suggestion that the clause as it stood would have involved the breach of an honourable understanding was, he believed, entirely unfounded, it would be disadvantageous to the public service that the least suspicion of anything of that kind should exist.

"The amendment was then agreed to."

"On the motion of Mr. W. WILLIAMS, in the absence of Mr. Gregory, the words, 'and such one other person as Her Majesty may be pleased to appoint by Letters Patent,' in the part of the clause relating to the appointment of the ordinary Judges of the Court, were altered to 'such three other persons,' &c."

* It stands thus in the Bill "as amended in Committee," printed on the motion of the writer.

“ Her Majesty’s Court of Appeal, in this Act and in the principal Act referred to as the Court of Appeal, shall be constituted as follows : There shall be five *ex-officio* Judges, thereof, and also so many ordinary Judges, not exceeding five at any one time, as Her Majesty shall from time to time appoint.

“ The *ex-officio* Judges shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer.

“ The first Ordinary Judges of the said court shall be the present Lords Justices of Appeal in Chancery, and such three other persons as Her Majesty may be pleased to appoint by Letters Patent. Such appointment may be made either before or after the commencement of this Act, but if made before shall take effect at the commencement of the Act.

“ The Ordinary Judges of the Court of Appeal shall be styled Lords Justices of Appeal.

“ Whenever the office of an Ordinary Judge of the Court of Appeal becomes vacant, a new Judge may be appointed thereto by Her Majesty by Letters Patent.

“ Provided that if any Puisne Judge of the Court of Queen’s Bench or Common Pleas, or any Junior Baron of the Court of Exchequer, is before the commencement of the principal Act appointed an Ordinary Judge of the Court of Appeal, a new Judge may be forthwith appointed in the place of such Puisne Judge or Junior Baron, such appointment to take effect at the commencement of the principal Act.

“ One or more of the Lords Justices of Appeal, if members of Her Majesty’s Privy Council, shall, so far as may be necessary, and so far as the state of business in the Court of Appeal may admit, attend the sittings of the Judicial Committee.”

On the report, the Attorney-General moved to insert the following new amendments, which, it will be seen, carry out the view of Sir Henry James :—

“ Page 2,—

"Line 21,* leave out ('five') and insert ('three')

"Line 27, leave out from ('such') to ('appoint') in line 30.

"Line 30, leave out ('one') and insert ('three')

"Line 31, leave out ('person') and insert ('persons')

"Line 35, leave out ('Lords')

"Line 36, after ('appeal') insert—

"The Lord Chancellor may by writing addressed to the president of any one or more of the following Divisions of the High Court of Justice, that is to say, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate Divorce, and Admiralty Division, request the attendance at any time, except during the times of the spring or summer Circuits, of an Additional Judge from such Division or Divisions (not being *ex-officio* Judge or Judges of the Court of Appeal) at the sittings of the Court of Appeal, and a Judge, to be selected by the Division from which his attendance is requested, shall attend accordingly.

"Every Additional Judge, during the time that he attends the sittings of Her Majesty's Court of Appeal, shall have all the jurisdiction and powers of a Judge of the said Court of Appeal, but he shall not otherwise be deemed to be a Judge of the said Court, or to have ceased to be a Judge of the Division of the High Court of Justice to which he belongs.

"Line 40, leave out from ('provided') to end of Clause 4."

Sir Henry James moved to amend the principal amendment by inserting the following words after "belongs":—

"Provided, that no Judge of the said Court of Appeal shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself, or made by any Divisional Court of the High Court of which he was and is a member."

This amendment, and the amendments of the Attorney-General, were accepted by the House.

The House of Lords, however, disagreed with the amend-

* The lines are not those of the Commons', but of the Lords' Bill. The Lords reprint the Commons' amendments, adapting them to their own copy of the Bill.

ment to leave out "one" and insert "three," assigning as their "reason" that "one Judge is more consistent with the scheme, as altered, than three Judges."

The Commons' amendment was evidently a mistake; as they had just before agreed that the number of "Ordinary Judges" should be three, and the two Lords Justices of Appeal, and "one other person to be appointed by Letters Patent," make up that number. The Judges sent over by the three Common Law divisions are to be "Additional," not "Ordinary Judges."

One curious result of the alterations made in this clause in the Lower House is, that there will be "Additional," as well as "*ex-officio*" and "Ordinary" Judges of Appeal, thus, to some extent, carrying out the view which Lord Selborne, in 1873, embodied in section 6 of his enactment.

The House of Lords altered the phraseology of Sir Henry James's amendment to "section 54, of the Principal Act is hereby repealed,* and instead thereof the following enactment shall take effect:—No Judge of the said Court of Appeal shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself, or made by any Divisional Court of the High Court of which he was and† is a member." If the reader will compare this amendment with section 54 of the Principal Act, he will see that enactment has been adapted to the present section by leaving out the word "himself," and inserting instead "and is." Under the Act of 1873, section 6, only persons (*inter alias*) having held in England the office of a Judge of the Superior Courts of Westminster, or of the Supreme Court," could be appointed "Additional Judges." Under the present section the Additional Judges will be persons *holding* in England the office of Judge of the Superior Courts of Westminster, or of the Supreme Court. Hence the need of inserting the words "and† is," when re-enacting section 54 of the Act of 1873.

The writer has thought it advisable to lay before the public and the profession this minute history of the successive steps by which the present section was moulded

* Query, Did Sir Henry forget that section 54 of the Principal Act made provision that Judges should not sit on appeals from themselves?

† It should be "or."

into its present form, in order that they may approach the consideration of the question of the constitution of the Courts of Appeal next Session, with a full knowledge of the various phases through which the question has passed during the past Session in the two Chambers of the Legislature.

SECTION 5.—*Tenure of office of Judges, and oaths of office; Judges not to sit in the House of Commons.*

All the Judges of the High Court of Justice, and of the Court of Appeal respectively, with the exception of the Lord Chancellor, shall hold their offices as such Judges respectively during good behaviour, subject to a power of removal by Her Majesty, on an address presented to Her Majesty by both Houses of Parliament. No Judge of either of the said Courts shall be capable of being elected to or of sitting in the House of Commons. Every person appointed after the passing of this Act to be Judge of either of the said Courts (other than the Lord Chancellor) when he enters on the execution of his office, shall take, in the presence of the Lord Chancellor, the oath of allegiance, and judicial oath as defined by the Promissory Oaths Act, 1868. The oaths to be taken by the Lord Chancellor shall be the same as heretofore.

This section is substituted for section 9 of the Principal Act, which provided that the Judges should hold office "*for life*," instead of "*during good behaviour*"—*quamdiu se bene gesserint*, and omitted the words, "*with the exception of the Lord Chancellor*." The office of Lord Chancellor is created by the mere delivery of the Great Seal into his possession, without writ or patent. The office ceases when the Lord

Chancellor delivers up the Great Seal, as he generally does whenever there is a change of ministry.

“During good behaviour.”—By the statute 12 and 13 Wm. II. c. 3, (A.D. 1700,) it was provided, that “Judges’ commissions be made *quamdiu se bene gesserint*; but upon the Address of both Houses of Parliament it may be lawful to remove them.” “To continue Judges in the enjoyment of their offices during their good behaviour notwithstanding any demise of the Crown,” it was enacted by the 1 Geo. III, c. 23, s. 1, that “the commissions of Judges for the time being shall be, continue, and remain in full force during good behaviour, notwithstanding the demise of His Majesty (whom God long preserve), or any of his heirs and successors.” By s. 2 it was provided that “it may be lawful for His Majesty, his heirs and successors, to remove any Judge or Judges upon the Address of both Houses of Parliament.”*

By 32 and 33 Vict. c. 71, s. 69, officers of any Court having jurisdiction in Bankruptcy are disqualified from sitting in Parliament (see 1 and 2 Wm. IV., c. 56, s. 60.) The Judge of the Admiralty Court is disqualified by 3 and 4 Vict., c. 66 (see 20 and 21 Vict. c. 77, s. 10). The Judge of the Probate and Divorce Court was not, it is believed, ineligible,† prior to the present enactment; neither was the Master of the Rolls. (Sir George Bowyer tried, but in vain, in Committee on the Bill to retain this privilege of the Master of the Rolls). Previously to the present enactment there was no statutory enactment excluding the Judges from sitting in the House of Commons, but they were declared by the House of Commons itself on 9th November, 1605,‡ to be ineligible, on the ground that they are the assistants of the House of Lords.†

The “oath of allegiance and the judicial oath” are thus “defined” by “the Promissory Oaths Act, 1868.”§

“The oath in this Act referred to as the oath of allegiance shall be in the form following, that is to say,

* It is rather singular that in the present section Judges are said to be removable by Her Majesty only, without mentioning “her heirs and successors” as in the old Acts. When repealing s. 9 of the Principal Act and re-enacting it this omission might have been corrected.

† Rogers on Elections, P. 198, n. (m), 10th ed.

‡ 1 Bl. Comm. 175, Com. Jour. 9th Nov., 1605.

§ 31 and 32 Vict., c. 72.

‘I do swear that I will be faithful
‘and bear true allegiance to Her Majesty Queen Victoria,
‘her heirs and successors, according to law.

‘So help me God.’ ”*

“The oath in this act referred to as the judicial oath shall be in the form following: that is to say,

‘I do swear that I will well and truly
‘serve our Sovereign Lady Queen Victoria in the office of
‘, and I will do right to all manner of people after
‘the laws and usages of this realm, without fear or favour,
‘affection or ill-will.

‘So help me God.’ ”†

“The oath of allegiance and judicial oath shall be taken by each of the officers named in the second part of the said Schedule hereto as soon as may be after his acceptance of office, and such oaths shall be tendered and taken in manner in which the oaths required to be taken by such officer previously to the passing of this Act on entering his office would have been tendered and taken.‡

“If any officer specified in the Schedule hereto declines or neglects, when any oath required to be taken by him under this Act is duly tendered, to take such oath, he shall, if he has already entered on his office, vacate the same, and if he has not entered on the same, be disqualified from entering on the same; but no person shall be compelled, in respect of the same appointment to the same office, to take such oath or make such affirmation more times than one.”

The second part of the Schedule includes the following 24 names, 22 of which, it will be seen, correspond with the list of names in §. 5 of the Principal Act:—

“The Lord Chancellor of Great Britain.

“The Lord Chief Justice.

“The Master of the Rolls.

“The Chief Justice of the Common Pleas.

“The Chief Baron of the Exchequer.

“The Lords Justices of the Court of Appeal in Chancery.

“The Vice-Chancellors.

“The Puisne Justices of the Queen’s Bench.

"The Puisne Justices of the Common Pleas.

"The Puisne Barons of the Exchequer.

"The Judge of the Admiralty Court.

"The Judge of the Probate Court."

It will be perceived that the oath of allegiance and the judicial oath are taken by the Lord Chancellor, as well as by the rest of the 21 Judges mentioned in the Schedule. Mr. Wynne Baxter* reproduces from Sir E. Coke† the following formidable list of oaths, which, he says, are taken by the Lord Chancellor:—

"1. That well and truly he shall serve our Sovereign Lady the Queen and her people in the office of Chancellor. 2. That he shall do right to all manner of people, poor and rich, after the laws and usages of the realm. 3. That he shall truly counsel the Queen, and his counsel he shall layne [Norman "to conceal,"] and keep. 4. That he shall not know nor suffer the hurt or disheriting of the Queen, or that the rights of the Crown be decreased by any means as far as he may let it. 5. If he may not let it, he shall make it clearly and expressly to be known to the Queen with his true advice and counsel. 6. And that he shall do and purchase the King's (*sic*) profit in all that he reasonably may, as God him help."

SECTION 6.—*Precedence of Judges.*

The Lord Chancellor shall be President of the Court of Appeal; the other *ex-officio* Judges of the Court of Appeal shall rank in the order of their present respective official precedence. The ordinary Judges of the Court of Appeal, if not entitled to precedence as Peers or Privy Counsellors, shall rank according to the priority of their respective appointments as such Judges.

The Judges of the High Court of Justice who

* Law and Practice of the Supreme Court, p. 158.

† 4 Inst., 88.

are not also Judges of the Court of Appeal shall rank next after the Judges of the Court of Appeal, and, among themselves (subject to the provisions in the Principal Act contained as to existing Judges) according to the priority of their respective appointments.

This section is substituted for section 10 of the Principal Act, which is repealed by section 33 of this Act, and the second Schedule, *infra*. The provisions of the 10th section of the Principal Act relative to the precedence of the "Additional Judges" are omitted. The provision that "the Lord Chancellor shall be President of the Court of Appeal" is taken from the repealed 6th section of the Principal Act:—"The Lord Chancellor for the time being shall be President of the Court of Appeal."

The order of precedence of the *ex-officio* Judges is as follows :—*

1. The Lord Chancellor.
2. The Lord Chief Justice of England.
3. The Master of the Rolls.
4. The Lord Chief Justice of the Common Pleas.
5. The Lord Chief Baron.

This is indeed, the order in which the names are placed in the 4th section, *supra*.

SECTION 7.—*Jurisdiction of Lords Justices in respect of Lunatics.*

Any jurisdiction usually vested in the Lords Justices of Appeal in Chancery, or either of them, in relation to the persons and estates of idiots, lunatics, and persons of unsound mind,

* See the list in 2 Steph. Comm., p. 614, n. (x). It is by Letters Patent 9, 10, and 14 Jac. 1 (which see in Seld. Tit. of Hon., II, 5, 46; and II, 3) that the present order was fixed.

shall be exercised by such Judge or Judges of the High Court of Justice or Court of Appeal as may be intrusted by the Sign Manual of Her Majesty or Her successors with the care and commitment of the custody of such persons and estates; and all enactments referring to the Lords Justices as so intrusted shall be construed as if such Judge or Judges so intrusted had been named therein instead of such Lords Justices: Provided that each of the persons who may at the commencement of the Principal Act be Lords Justices of Appeal in Chancery shall, during such time as he continues to be a Judge of the Court of Appeal, and is intrusted as aforesaid, retain the jurisdiction vested in him in relation to such persons and estates as aforesaid.

By subsection 3 of section 17, it is enacted that "there shall not be transferred to, or vested in the High Court of Justice any jurisdiction usually vested in the Lord Chancellor or in the Lords Justices of Appeal in Chancery, or either of them, in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind."

This enactment is repealed as to successors of the existing Lords Justices of Appeal in Chancery by the present section.

To save the jurisdiction in lunacy of the Lord Chancellor, Mr. Osborne Morgan, Q.C., proposed in Committee on the Bill in the House of Commons to insert the following additional proviso: "Provided also, that nothing herein contained shall affect the jurisdiction usually vested in the Lord Chancellor in relation to the persons and estates of idiots, lunatics, and persons of unsound mind." The Attorney-General, nowever, declined to accept the amendment, on the ground that the jurisdiction in

lunacy of the Lord Chancellor is not touched by the present section, which is, in express terms, limited to the jurisdiction in lunacy of the Lords Justices of Appeal.

The office of Lord Justice of Appeal was created in the autumn of 1851.* The Lunacy Regulation Act took effect on the 28th October, 1853, and by its interpretation clause † it was enacted, that the expression, “the Lord Chancellor entrusted as aforesaid” (which frequently occurs in the Act) should be construed to mean “the Lord High Chancellor of Great Britain for the time being, entrusted, by virtue of the Queen’s sign manual, with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind; and when, and *so long as* the Lords Justices of the Court of Appeal in Chancery for the time being shall be entrusted as aforesaid concurrently with the Lord Chancellor, then, and *so long*, the expression shall be construed to include, or be applicable to, the Lords Justices aforesaid, so that all the powers, authorities, and duties to be had, exercised, and performed under this Act by the Lord Chancellor entrusted as aforesaid shall, and may be had, exercised, and performed as well by the Lord Chancellor, sitting either alone or jointly with both or either of the Lords Justices, or by both of the Lords Justices aforesaid, acting jointly, apart from the Lord Chancellor.”

By the 13th section of the “Court of Chancery Officers Act, 1867,‡ it is provided, that all the jurisdiction, powers, authorities, and duties of the Lord Justices of the Court of Appeal in Chancery, under ‘The Lunacy Regulation Act, 1853,’ and under any other Act, as being entrusted, by virtue of the Queen’s Sign Manual, with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind, may be exercised and performed, not only by both of the Lords Justices jointly acting and sitting together, but also by either of them alone, acting or sitting separately.”

By section 4 of the present Act, *supra*, it is enacted that two of the “first ordinary Judges of the Court

* By the Stat. 14 & 15 Vict., c. 83.

† 16 & 17 Vict., c. 70, s. 2.

‡ 30 & 31 Vict., c. 87.

of Appeal shall be the present Lords Justices of Appeal in Chancery." So that during the continuance in office of the existing Lords Justices,* the proviso at the end of the section will render the rest of the section nugatory. On the death of one of them, a new colleague in lunacy matters will probably be associated with the survivor.

See the note to s. 2, *supra*.

SECTION 8.—*Admiralty Judges and Registrar.*

Whereas by section 11 of the Principal Act it is provided as follows: "Every existing
 "judge who is by this Act made a judge of the
 "High Court of Justice or an ordinary judge of
 "the Court of Appeal shall, as to tenure of office,
 "rank, title, salary, pension, patronage, and
 "powers or appointment or dismissal, and all other
 "privileges and disqualifications, remain in the
 "same condition as if this Act had not passed;
 "and, subject to the change effected in their juris-
 "diction and duties by or in pursuance of the pro-
 "visions of this Act, each of the said existing
 "judges shall be capable of performing and liable
 "to perform all duties which he would have
 "been capable of performing or liable to perform
 "in pursuance of any Act of Parliament,
 "law, or custom if this Act had not passed.
 "No judge appointed before the passing of this
 "Act shall be required to act under any commis-
 "sion of Assize, Nisi Prius, Oyer and Terminer,
 "or Gaol Delivery, unless he was so liable by usage
 "or custom at the commencement of this Act:"

* Sir W. Milbourne James and Sir George Mellish.

And whereas the judge of the High Court of Admiralty is by the Principal Act appointed a judge of the High Court of Justice :

And whereas such judge is, as to salary and pension, inferior in position to the other puisne judges of the superior Courts of common law, but holds certain ecclesiastical and other offices in addition to the office of judge of the High Court of Admiralty :

And whereas it is expedient that such judge, if he be willing to relinquish such other offices, should be placed in the same position as to rank, salary, and pension, as the other puisne judges of the superior Courts of common law :

Be it enacted that—

If the existing judge of the High Court of Admiralty* under his hand signifies to the Lord Chancellor in writing, before the commencement of the Principal Act, that he is willing to relinquish such other offices as aforesaid, and does, before the commencement of the Principal Act, resign all other offices of emolument held by him except the office of Judge of the High Court of Admiralty, he shall, from and after the commencement of the Principal Act, be entitled to the same rank, salary, and pension as if he had been appointed a judge of the High Court of Justice immediately on the commencement of the Principal Act, with this addition, that in

* The Right Hon. Sir Robert James Phillimore.

reckoning service for the purposes of his pension, his service as a judge of the High Court of Admiralty shall be reckoned in the same manner as if the High Court of Justice had been established at the time of his accepting the office of judge of the High Court of Admiralty, and he had continued from such time to be a judge of the said High Court of Justice.

The present holder of the office of Registrar of Her Majesty in Ecclesiastical and Admiralty causes shall, as respects any appeals in which he would otherwise be concerned coming within the cognizance of the Court of Appeal, be deemed to be an officer attached to the Supreme Court, and the office, so far as respects the duties in relation to such appeals as aforesaid, shall be deemed to be a separate office within the meaning of section seventy-seven of the Principal Act, and may be dealt with accordingly. He shall be entitled, in so far as he sustains any loss of emoluments by or in consequence of the Principal Act or this Act, to prefer a claim to the Treasury in the same manner as an officer paid out of fees whose emoluments are affected by the passing of the Principal Act is entitled to do under section 80 of the Principal Act.

Subject as aforesaid, the person who is at the time of the passing of this Act Registrar of Her Majesty in Ecclesiastical and Admiralty causes shall, notwithstanding anything in the Principal

Act or this Act, have the same rank and hold his office upon the same tenure and upon the same terms and conditions as heretofore; but it shall be lawful for Her Majesty by Order in Council made upon the recommendation of the Lord Chancellor, with the concurrence of the Treasury, to make, notwithstanding anything contained in any Act of Parliament, such arrangements with respect to the duties of the said last-mentioned office, either by abolition thereof or otherwise, as to Her Majesty may seem expedient: Provided that such Order shall not take effect during the continuance in such office of the said person so being Registrar at the time of the passing of this Act without his assent.

Every judge of the Probate, Divorce, and Admiralty Division of the said High Court of Justice appointed after the passing of this Act shall, so far as the state of business in the said Division will admit, share with the Judges mentioned in section thirty-seven of the Principal Act the duty of holding sittings for trials by jury in London and Middlesex, and sittings under commissions of Assize, Oyer and Terminer, and Gaol Delivery.

See the note to s. 11 of the Principal Act. The section of the Principal Act by which the Judge of the High Court of Admiralty is made a Judge of the High Court of Justice is the 5th.

The option given to Sir Robert Phillimore of resigning "certain ecclesiastical offices" evidently has reference to

the provision made for filling such offices by "The Public Worship Act, 1874,"* s. 7 of which enacts, that "*whenever a vacancy shall occur in the office of Official Principal of the Arches Court of Canterbury, the Judge,*" appointed by the Archbishops of Canterbury and York, under that Act,† "*shall become, ex-officio, such Official Principal; and all proceedings thereafter taken before the Judge in relation to matters arising within the province of Canterbury shall be deemed to be taken in the Arches Court of Canterbury; and whenever a vacancy shall occur in the office of Master of the Faculties to the Archbishop of Canterbury, such Judge shall become, ex-officio, such Master of the Faculties.*"

Sir Robert Phillimore is Official Principal of the Arches Court of Canterbury and Master of the Faculties to the Archbishop of Canterbury, as well as Judge of the High Court of Admiralty. If he resigns before the 1st of November, 1875, these offices, Lord Penzance will at once succeed him under s. 7 of the Public Worship Act, 1874, and Sir Robert will, at the same time, in virtue of this act of self-abnegation, immediately become entitled to the same rank, salary, and pension as the other Judges of the High Court of Justice, to whom he is now "inferior in position."‡

The 37th section of the Principal Act only mentioned the "Judges of the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court," as available for performing "the duty" mentioned in the concluding paragraph of the present section.

SECTION 9.—*London Court of Bankruptcy not to be transferred to High Court of Justice.*

The London Court of Bankruptcy shall not be united or consolidated with the Supreme Court

* 37 & 38 Vict., c. 85.

† Lord Penzance.

‡ It is not a little curious that the present section contains not the slightest reference to the Public Worship Act, 1874.

of Judicature, and the jurisdiction of that Court shall not be transferred under the Principal Act to the High Court of Justice, but shall continue the same in all respects as if such transfer had not been made by the Principal Act, and the Principal Act shall be construed as if such union, consolidation, and transfer had not been made: Provided that

- (1.) The office of Chief Judge in Bankruptcy shall be filled by such one of the Judges of the High Court of Justice appointed since the passing of the Bankruptcy Act, 1869, or, with his consent, of such one of the Judges appointed prior to the passing of the last-mentioned Act, as may be appointed by the Lord Chancellor to that office; and
- (2.) The appeal from the London Court of Bankruptcy shall lie to the Court of Appeal in accordance with the Principal Act.

As this section originally stood the words "from time to time" followed the word "shall," in the first subsection. These words were omitted in Committee on the Bill in the House of Commons,* on the motion of Mr. Herschell, Q.C., on the ground that they would give power to the Lord Chancellor "to set aside a Judge who might be displeasing to him and appoint another in his place."

The area of selection of Judges was confined by the present Bill to "Judges of the Exchequer Division of the High Court;" the words "of the Exchequer Division" were struck out in Committee on the Bill in the House of Com-

* July 5th, 1875. See *Times* of July 6.

mons,* on the motion of Mr. Osborne Morgan, Q.C., thus enlarging the area of selection.

(1.) This section repeals subsection (8) of s. 16, and subsections (3) and (4) of clause 4 of section 34 of the Principal Act. Allusions to the London Court of Bankruptcy in the Rules of Court drawn up in 1874 under the Principal Act, have been expunged in the amended edition of these Rules inserted in the first Schedule hereto.

(2.) The present section, it will be seen, does not affect the provision of subsection (1) of the 18th section of the Principal Act—that there shall be transferred to and vested in the Court of Appeal all jurisdiction and power of the Court of Appeal in Chancery as a Court of Appeal in Bankruptcy, under s. 71 of the Bankruptcy Act, 1869.†

SECTION 10.—*Amendment of 36 and 37 Vict., c. 66, s. 25, as to Rules of Law upon certain points.*

Whereas, by section twenty-five of the Principal Act, after reciting that it is expedient to amend and declare the law to be thereafter administered in England as to the matters next thereafter mentioned, certain enactments are made with respect to the law, and it is expedient to amend the said section: Be it therefore enacted as follows:—

Subsection one of clause twenty-five of the Principal Act is hereby repealed, and instead thereof the following enactment shall take effect; (that is to say) in the administration by the Court of the assets of any person who may die after the commencement of this

* July 5th, 1875. See *Times* of July 6th.

† See as to this appeal, Roche and Hazlitt on Bankruptcy, pp. 111-113.

Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any Company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such Company, may come in under the decree or order for the administration of such estate, or under the winding up of such Company, and make such claims against the same as they may respectively be entitled to by virtue of this Act.

In subsection seven of the said section the reference to the date of the passing of the Principal Act shall be deemed to refer to the date of the commencement of the Principal Act.

As to subsection 1 of clause 25 of the Principal Act, see the notes to that "clause."*

The effect of the amendment of subsection (1) of section 25 of the Principal Act, by this section, is to make the rules of Bankruptcy "as to the respective rights of secured and unsecured creditors, and as to debts and liabilities proveable, and as to the valuation of annuities and future or contingent liabilities respectively," applicable to the winding up under the Companies Acts, 1862 and 1867, of Companies whose assets may prove to be insufficient, as well as in the administration by the Court of the assets of persons whose estate may prove to be insufficient.

It will be perceived, on comparing the substituted provisions with those of the repealed subsection, that the words "after the commencement of this Act" are substituted for "after the passing of this Act." Subsection (1) of s. 25 of the Principal Act in its unamended form applied, it is apprehended, to the administration by the Court of the assets of any person who died after the passing and before the commencement of the Principal Act, *i.e.*, between the 5th of August, 1873, and the 1st of November, 1875. The repeal is *not retrospective*, and therefore, as the present section does not come into operation until the 1st November, 1875, the Principal Act cannot be affected by it until then. On and after the 1st November, 1875, subsection (1) of the 25th section of the Principal Act, will only apply to the administration of the assets of persons who die after that date.

In subsection (7) of s. 25 there is a somewhat similar slip.

The present section attempts to cure it, but it is apprehended, that in this case the subsection does not stand in need of any cure. The subsection provides that stipulations in contracts as to time or otherwise which would not before the *passing* of the Act (*i.e.*, before the 5th August, 1873) have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in Equity.

* It should have been "section," as in the preamble.

The expression "passing of this Act," in this subsection only fixes the time at which the particular construction was received in Equity, and does *not* say that it shall receive the same construction in other Courts at and from that time, *i.e.*, the 5th August, 1873. The only effect of the amendment introduced into subsection (7) of the Principal Act by the present section is to fix the 1st November, 1875, as the date at which the particular construction was received in Equity, and as the particular construction received in Equity then will be the same as that received in Equity on the 5th August, 1873, the attempt to amend subsection (7) of the principal Act is, it is submitted, unnecessary.

SECTION 11.—*Provision as to option for any Plaintiff (subject to Rules) to choose in what Division he will sue,—in substitution for 36 and 37 Vict., c. 66, s. 35.*

Subject to any Rules of Court and to the provisions of the Principal Act and this Act and to the power of transfer, every person by whom any cause or matter may be commenced in the said High Court of Justice shall assign such cause or matter to one of the Divisions of the said High Court as he may think fit, by marking the document by which the same is commenced with the name of such Division, and giving notice thereof to the proper officer of the Court: Provided, that

- (1.) All interlocutory and other steps and proceedings in or before the said High Court in any cause or matter subsequent to the commencement thereof, shall be taken (subject to any Rules of Court and to the power of transfer) in the Division of

the said High Court to which such cause or matter is for the time being attached ; and

- (2.) If any plaintiff or petitioner shall at any time assign his cause or matter to any Division of the said High Court to which, according to the Rules of Court or the provisions of the Principal Act or this Act the same ought not to be assigned, the Court, or any Judge of such Division, upon being informed thereof, may on a summary application at any stage of the cause or matter, direct the same to be transferred to the Division of the said Court to which, according to such Rules or provisions, the same ought to have been assigned, or he may, if he think it expedient so to do, retain the same in the Division in which the same was commenced ; and all steps and proceedings whatsoever taken by the plaintiff or petitioner, or by any other party in any such cause or matter, and all Orders made therein by the Court or any Judge thereof before any such transfer shall be valid and effectual to all intents and purposes in the same manner as if the same respectively had been taken and made in the proper Division of the said Court to which such cause or matter ought to have been assigned ; and

- (3.) Subject to Rules of Court, a person commencing any cause or matter shall not assign the same to the Probate, Divorce, and Admiralty Division unless he would have been entitled to commence the same in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, if this Act had not passed.

This section is substituted for section 35 of the Principal Act which is repealed by this Act (section 33, and the second Schedule). The whole of section 35 of the Principal Act is re-enacted *verbatim* by the present section, subsection 3 being added to it, in order to obviate the inconvenience which might have arisen from plaintiffs "assigning causes" in the first instance to the Probate, Divorce, and Admiralty Divisions, although wholly unsuited to be tried there. (See Order V., Rule 4, *infra*, and the note thereto.)

The "notice to the proper officer" of the assignment of an action to any Division of the Court under this section will be sufficiently given by leaving with him a copy of the writ of summons. (Order V, Rule 9, of the Schedule to this Act.)

SECTION 12.—*Sittings of Court of Appeal.*

Every appeal to the Court of Appeal shall, where the subject-matter of the appeal is a final order, decree, or judgment, be heard before not less than three Judges of the said Court sitting together, and shall, when the subject-matter of the appeal is an interlocutory order, decree, or judgment, be heard before not less than two Judges of the said Court sitting together.

Any doubt which may arise as to what decrees, orders, or judgments are final, and which are interlocutory, shall be determined by the Court of Appeal.

Subject to the provisions contained in this section the Court of Appeal may sit in two Divisions at the same time.

This section is substituted for s. 53 of the Principal Act, which is repealed by s. 33, and the 2nd Schedule hereto (see the note to the repealed section.) Some of the provisions are similar to those of the repealed enactment—the quorum of three, and the power to form Divisional Courts. But these provisions are qualified by others. The quorum of three only applies where the appeal is from “a final order, decree, or judgment.” When an appeal is from an interlocutory decree, order, or judgment, the quorum may be reduced to two, and the Court of Appeal is *itself* to decide when the quorum of two will be sufficient.

As the Ordinary Judges of the Court of Appeal are only three in number, it will be necessary to send over to the Common Law Divisions for an Additional Judge, or to secure the attendance of an *ex-officio* Judge to make up a sufficient quorum for appeal, even on interlocutory matters, if the Court of Appeal is to sit in two Divisions.

The power of sitting in two Divisions, may, however, prove useful in the event of a press of business.

SECTION 13.—*Amendment of s. 60 of 36 and 37 Vict., c. 66, as to District Registrars.*

Whereas by section sixty of the Principal Act it is provided that for the purpose of facilitating the prosecution in country districts of legal proceedings, it shall be lawful for Her Majesty by Order

in Council from time to time to direct that there shall be District Registrars in such places as shall be in such Order mentioned for districts to be thereby defined; and whereas it is expedient to amend the said section, Be it therefore enacted that—

Where any such Order has been made, two persons may, if required, be appointed to perform the duties of District Registrar in any district named in the Order, and such persons shall be deemed to be joint District Registrars, and shall perform the said duties in such manner as may from time to time be directed by the said Order, or any Order in Council amending the same.

Moreover, the Registrar of any inferior court of record having jurisdiction in any part of any district defined by such Order (other than a county court) shall, if appointed by Her Majesty, be qualified to be a District Registrar for the said district, or for any and such part thereof as may be directed by such Order or any Order amending the same.

Every District Registrar shall be deemed to be an officer of the Supreme Court, and be subject accordingly to the jurisdiction of such Court, and of the Divisions thereof.

The persons specially indicated by section 60 of the Principal Act as eligible for the office of District Registrar are “any Registrar of any County Court or any Registrar or Prothonotary or District Prothonotary of any local Court whose jurisdiction is” thereby “transferred to the High Court of Justice, or from which an appeal is

thereby given to the Court of Appeal ; or any person, who, having been a District Registrar of the Court of Probate, or of the Admiralty Court, shall under " that " Act become and be a District Registrar of the High Court of Justice, or who shall be appointed such District Registrar." For a list of " the local courts whose jurisdiction is transferred by the Principal Act to the High Court of Justice," see section 16 of the Principal Act. For a list of the " local courts from which an appeal is given to the Court of Appeal," see section 18 of the Principal Act.

On the 12th of August, 1875, the day before the present Act received the Royal Assent, Her Majesty in Council, in exercise of the powers conferred upon Her by s. 60 of the Principal Act, was pleased to order :—" That there shall be District Registrars in the places of Liverpool, Manchester, and Preston, and the District Registrar at Liverpool of the High Court of Admiralty, and the District Prothonotary at Liverpool of the Court of Common Pleas at Lancaster, shall be and are hereby appointed the District Registrars in Liverpool ; and the District Prothonotary at Manchester of the said Court of Common Pleas shall be and is hereby appointed the District Registrar in Manchester ; and the District Prothonotary at Preston of the said Court of Common Pleas shall be and is hereby appointed the District Registrar at Preston ; and that the district for each such place shall be the district now assigned to each such District Prothonotary, under the provisions and authority of the Common Pleas at Lancaster Amendment Act, 1869.

" That there shall be a District Registrar in Durham, and that the District Prothonotary of the Court of Common Pleas at Durham shall be and is hereby appointed the District Registrar in Durham ; and that the district shall be the district, for the time being, of the County Court holden at Durham.

" That in the places mentioned in the Schedule annexed, there shall be District Registrars, and that the Registrar of the County Court held in any such place shall be and is hereby appointed the District Registrar in such place, and that the district for each such place shall be the district, for the time being, of the County Court holden at such place."

The Schedule contains the names of the following places:—Bangor, Barnsley, Barnstaple, Bedford, Birkenhead, Birmingham, Boston, Bradford, Bridgewater, Brighton, Bristol, Bury St. Edmunds, Cambridge, Cardiff, Carlisle, Carmarthen, Cheltenham, Chester, Colchester, Derby, Dewsbury, Dover, Dorchester, Dudley, East Stonehouse, Exeter, Gloucester, Great Grimsby, Great Yarmouth, Halifax, Hanley, Hartlepool, Hereford, Huddersfield, Ipswich, Kingston-on-Hull, Kings Lynn, Leeds, Leicester, Lincoln, Lowestoft, Maidstone, Newcastle-upon-Tyne, Newport, Monmouthshire, Newport, Isle of Wight, Newtown, Northampton, Norwich, Nottingham, Oxford, Pembroke Docks, Peterborough, Poole, Portsmouth, Ramsgate, Rochester, Sheffield, Shrewsbury, Southampton, Stockton-on-Tees, Sunderland, Swansea, Truro, Totnes, Wakefield, Walsall, Whitehaven, Wolverhampton, Worcester, York. It is apprehended that under the present section the District Registrar at Liverpool of the High Court of Admiralty, and the District Prothonotary at Liverpool of the Court of Common Pleas at Lancaster will be “joint District Registrars for Liverpool.”

Every effort, it will be seen, has been made to confer, as far as practicable, upon the suitors of the Counties Palatine of Lancaster and Durham, advantages similar to those which they derived from the abolished jurisdiction of their local Courts.

SECTION 14.—*Amendment of 36 and 37 Vict., c. 66.*

s. 87, as to enactments relating to attorneys.

Whereas under section eighty-seven of the Principal Act, Solicitors and Attorneys will, after the commencement of that Act, be called Solicitors of the Supreme Court: Be it therefore enacted that—

The Registrar of Attorneys and Solicitors in England shall be called the Registrar of Solicitors, and the Lord Chief Justice of England, the

Master of the Rolls, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron, or any two of them, may, from time to time, by regulation adapt any enactments relating to Attorneys and any declaration, certificate, or form required under those enactments to the Solicitors of the Supreme Court under section eighty-seven of the Principal Act.

This section supplies an extraordinary omission in the Supreme Court of Judicature Bill, 1874. No power was taken in that Bill to adapt the existing law relative to the registration of Attorneys and Solicitors to the changes introduced by section 87 of the Principal Act.* It was the opinion of those best qualified to judge of the matter that, on and after the 1st of November, 1874, no person could have been entered on the registrar of the Incorporated Law Society as an Attorney-at-Law.

SECTION 15.—*Appeal from Inferior Court of Record.*

It shall be lawful for Her Majesty from time to time, by Order in Council, to direct that the enactments relating to appeals from County Courts shall apply to any other inferior Court of Record; and those enactments, subject to any exceptions, conditions, and limitations contained in the Order, shall apply accordingly, as from the date mentioned in the Order.

* At the request of Mr. Williamson, the Secretary of the Incorporated Law Society, the writer placed an amendment to clause 15 of the Supreme Court of Judicature Bill, 1874, on the notice paper of the House of Commons, giving the Secretary power to adapt the registration forms then in use by the Society to the provisions of that measure.

The enactments relating to appeals from County Courts are specified in the notes to section 45 of the Principal Act. Under that section the appeal from County Courts will, in all cases, except the case of appeals under the Bankruptcy Act, 1869, lie to Divisional Courts of the High Court of Justice.*

SECTION 16.—*Rules in Schedule in substitution for 36 & 37 Vict., c. 66, s. 69 and Schedule.*

The Rules of Court in the first Schedule to this Act shall come into operation at the commencement of this Act, and as to all matters to which they extend shall thenceforth regulate the proceedings in the High Court of Justice and Court of Appeal. But such Rules of Court and also all such other Rules of Court (if any) as may be made after the passing and before the commencement of this Act under the authority of the next section may be annulled or altered by the authority by which new Rules of Court may be made after the commencement of this Act.

This section is substituted for section 69 of the Principal Act, which is repealed by section 33 of this Act, and the second Schedule. Section 69 of the Principal Act is practically re-enacted by the present section,† but with the necessary alterations to adapt its provisions to the first Schedule of this Act.

The Rules of Court in the first Schedule hereto consist partly of the Rules appended to the Principal Act, and of the Rules drawn up under that Act in 1874, both having been revised and adapted to the present Act.

* See further as to inferior Courts and their Jurisdiction, part vi. of the Principal Act.

† See the note to that section at p. 134.

The last clause of the section will, of course, apply to the new Rules issued by Her Majesty in Council on the 12th of August, 1875.

SECTION 17.—*Provision as to making, &c., of Rules of Court before or after the commencement of the Act, in substitution for 36 and 37 Vict., c. 66, ss. 68 and 74, and Schedule.*

Her Majesty may, at any time after the passing, and before the commencement, of this Act, by Order in Council, made upon the recommendation of the Lord Chancellor and the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and the Lords Justices of Appeal in Chancery, or any five of them, and the other Judges of the several Courts intended to be united and consolidated by the Principal Act, as amended by this Act, or of a majority of such other Judges, make any further or Additional Rules of Court for carrying the Principal Act and this Act into effect, and, in particular, for all or any of the following matters, so far as they are not provided for by the Rules in the first Schedule to this Act; that is to say,

- (1.) For regulating the sitting of the High Court of Justice and the Court of Appeal, and of any Divisional or other Courts thereof respectively, and of the Judges of the said High Court sitting in Chambers; and

- (2.) For regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal; and
- (3.) Generally, for regulating any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or of the Supreme Court, or to the costs of proceedings therein.

From and after the commencement of this Act, the Supreme Court may at any time, with the concurrence of a majority of the Judges thereof present at any meeting for that purpose held (of which majority the Lord Chancellor shall be one), alter and annul any Rules of Court for the time being in force, and have and exercise the same power of making Rules of Court as is by this section vested in Her Majesty in Council on the recommendation of the said Judges before the commencement of this Act.

All Rules of Court made in pursuance of this section shall be laid before each House of Parliament within such time, and shall be subject to be annulled in such manner as is in this Act provided.

All Rules of Court made in pursuance of this section, if made before the commencement of this Act, shall from and after the commencement of this Act, and if made after the commencement of this Act, shall, from and after they come into operation, regulate all matters to which they

extend, until annulled or altered in pursuance of this section.

The reference to certain Judges in section twenty-seven of the principal Act shall be deemed to refer to the Judges mentioned in this section as the Judges on whose recommendation an Order in Council may be made.

This section is substituted for sections 68 and 74 of the principal Act, which are repealed by section 33 and the second Schedule to this Act.

As the present section originally stood, the words "including all matters connected with writs, forms of actions, parties to actions, evidence, and mode of trial," followed the words, "Court of Appeal," in the second sub-section. Mr. Butt, however, moved in Committee on the Bill in the House of Commons* to omit the former words, on the ground that the powers which they conferred on the Judges were too extensive,† and the Attorney-General accepted the amendment. There is now some tautology in subsections (2) and (3).

On the 12th of August, 1875, Her Majesty in Council in exercise of the powers conferred upon Her by this section, was pleased, upon the recommendation of the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron, and the Lords Justices of Appeal, and a majority of the other Judges, to make and issue six new Orders‡ regulating the printing of proceedings, and the cost of proceedings in the Supreme Court. These new Orders will be found at the end of this volume.

The "certain judges," referred to in section 27, are empowered thereby to make Orders before the commencement of the Act regulating vacations.

* July 5th, 1875. See *Times* of July 6th.

† "This sub-section would give the judges power to abolish trial by jury." The amendment was supported by the Right Hon. Hugh Law, Q.C. and Mr. Waddy, Q.C. *Times*, July, 6th, 1875.

‡ Published in the *London Gazette* of 24th August, 1875.

SECTION 18.—*Provision as to Rules of Probate, Divorce, and Admiralty Courts, being Rules of the High Court,—in substitution for 36 and 37 Vict., c. 66, s. 70.*

All Rules and Orders of Court in force at the time of the commencement of this Act in the Court of Probate, the Court for Divorce and Matrimonial Causes, and the Admiralty Court, or in relation to appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in Chancery in bankruptcy matters, except so far as they are expressly varied by the first Schedule hereto, or by Rules of Court made by Order in Council before the commencement of this Act, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively until they shall respectively be altered or annulled by any Rules of Court made after the commencement of this Act.

The present Judge of the Probate Court and of the Court for Divorce and Matrimonial Causes shall retain, and the President for the time being of the Probate and Divorce Division of the High Court of Justice shall have, with regard to non-contentious or common form business in the Probate Court, the powers now conferred on the Judge of the Probate Court by the thirtieth section of the twentieth and twenty-first years of Victoria, chapter seventy-seven, and the said Judge shall retain, and the said President shall have, the powers as to

the making of rules and regulations conferred by the fifty-third section of the twentieth and twenty-first years of Victoria, chapter eighty-five.

This section is substituted for section 70 of the Principal Act, which is repealed by section 33 and the second Schedule of this Act. The repealed enactment is re-enacted by the present section, with the alterations necessary to adapt it to the first Schedule of this Act and to the 9th section, *supra*.

The words "London Court of Bankruptcy" are omitted, and the words "or in relation to appeals from the Chief Judge in Bankruptcy or from the Court of Appeal in Chancery in Bankruptcy matters" are substituted.

For a list of the authorities which contain the Rules and Orders referred to in this section, see the note to s. 70 of the Principal Act, p. 136.

Section 30 of the 20 and 21 Vict., c. 77, empowers the Judge of the Probate Court to make "Rules and Orders."

SECTION 19.—*Provisions as to Criminal Procedure, subject to future Rules remaining unaltered,—in substitution for 36 and 37 Vict., c. 66, s. 71.*

Subject to the first Schedule hereto and any Rules of Court to be made under this Act, the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice and in the Court of Appeal respectively, including the practice and procedure with respect to Crown Cases Reserved, shall be the same as the practice and procedure in similar causes and matters before the commencement of this Act.

This section is substituted for section 71 of the Principal Act, which is repealed by section 33 and the second Schedule to this Act. The seventy-first section of the Principal Act is re-enacted by the present section with the alterations necessary to adapt it to the first Schedule of

this Act, "subject to the first Schedule hereto and any Rules of Court to be made under this Act" being substituted for "subject to any Rules of Court to be made under and by virtue of this Act."

"Crown cases reserved" the interpretation clause of the Principal Act (s. 100) applies to this Act, by virtue of s. 1 *supra*.

"Crown cases reserved," therefore, means (p. 170) such questions of law reserved on criminal trials as are mentioned in the Act of the 11th and 12th years of Her Majesty's reign, chapter 78. See s. 47 of the Principal Act and the note thereto.

SECTION 20.—*Provision as to Act not affecting Rules of Evidence or Juries,—in substitution for 36 and 37 Vict. c. 66, s. 72.*

Nothing in this Act or in the first Schedule hereto, or in any Rules of Court to be made under this Act, save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to jurymen or juries.

This is one of the transition clauses of this Act. This section is substituted for section 72 of the Principal Act, which is repealed by section 33 and the second Schedule of this Act. The 72nd section of the Principal Act is re-enacted by the present section with the addition of the word "first" before "schedule." "Save as far as relates to the power of the power of the Court for special reasons to allow depositions or affidavits to be read." This has reference to Order XXXVII, Rules 1 and 2 of the first Schedule hereto:—"In the absence of any agreement between the parties, and subject to these Rules, the witnesses at the trial of any action or at any assessment of damages, shall be examined *vivâ voce* and in open Court,

but the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that where it appears to the Court or Judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.* Upon any motion, petition, or summons evidence may be given by affidavit; but the Court or a Judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.”†

Order XXXVIII regulates the practice where evidence is allowed to be given by affidavit. As to oral evidence, see C. L. P. Act, 1854, ss. 18–31.

“Trials by jury or the rules of evidence.”—See section 22, *infra*. As to “Juries,” see 6 George IV., c. 50; 25 and 26 Vict., c. 107, and 33 and 34 Vict., c. 77.

SECTION 21.—*Provision for saving of existing procedure of courts when not inconsistent with this Act or Rules of Court—in substitution for 36 and 37 Vict., c. 66, s. 73.*

Save as by the Principal Act or this Act, or by any Rules of Court, may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the courts whose jurisdiction is by the Principal Act or this Act transferred to the said High Court and to the said Court of Appeal respectively, under or by virtue of any law, custom,

* This Rule is a re-enactment of Rule 36 of the Principal Act.

† This Rule is a re-enactment of Rule 37 of the Principal Act.

general order, or rules whatsoever, and which are not inconsistent with the Principal Act or this Act, or with any Rules of Court, may continue to be used and practised, in the said High Court of Justice and the said Court of Appeal respectively in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective courts of which the jurisdiction is so transferred, if the Principal Act and this Act had not passed.

This is one of the transition clauses of this Act. This section is substituted for section 73 of the Principal Act which is repealed by section 33 of the second Schedule to this Act. The 73rd section of the Principal Act is re-enacted by the present section, with the alterations necessary to adapt it to the present enactment, as well as the Principal Act.

The next section was originally an amendment to the present section proposed by Mr. Watkin Williams, Q.C., and accepted by the Attorney-General, in Committee on the Bill in the House of Commons. By some mysterious process in the House of Lords the amendment was severed from the present section, to which it was attached in the copy of the Bill as amended in Committee, printed for the use of the House of Commons on the motion of the writer, and reappeared in the Queen's printer's copy, as a separate section, with a marginal note to itself.

There can be little doubt that the transformation of the amendment of Mr. Williams into a separate section is a decided improvement.*

SECTION 22.—*Nothing in principal Act to prejudice right to have issues submitted, &c.*

Whereas by section forty-six of the principal

* It involved, however, an alteration in the numbering of all the subsequent clauses, making clause 32, the repealing clause, *e.g.*, section 33.

Act it is enacted that “any Judge of the said
 “ High Court sitting in the exercise of its juris-
 “ diction elsewhere than in a Divisional Court may
 “ reserve any case, or any point in a case, for the
 “ consideration of a Divisional Court, or may direct
 “ any case or point in a case to be argued before a
 “ Divisional Court :” Be it hereby enacted, that
 nothing in the said Act, nor in any Rule or Order
 made under the powers thereof or of this Act,
 shall take away or prejudice the right of
 any party to any action to have the issues
 for trial by jury submitted and left by the
 Judge to the jury before whom the same
 shall come for trial, with a proper and com-
 plete direction to the jury upon the law, and as
 to the evidence applicable to such issues :

Provided also, that the said right may be en-
 forced either by motion in the High Court of Jus-
 tice or by motion in the High Court of Appeal
 founded upon an exception entered upon or
 annexed to the record.

The marginal note to this section is not very intelligible, but it was only added, it is believed, after the Bill received the Royal Assent, when Mr. Watkin Williams’ amendment to the preceding section was mysteriously transformed into a separate section.* See s. 46 of the Principal Act, and the note thereto, at p. 107.

Trial by jury is generally considered to have had its origin in the famous declaration of King John in Magna Charta :†—“ *Nullus liber homo capiatur, vel imprisonetur*

* See the note to the preceding section.

† It now appears in 9 Hen. III., c. 29.

aut disseiziatur de libero tenemento suo, vel de libertatibus vel liberis consuetudinibus suis, aut utlagetur aut exulet, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terræ."

The "*lex terræ*" referred, Mr. Hallam believes,* to trial by combat and by ordeal, the latter including "trial by handling or walking on red hot iron, by plunging the arm into boiling fluids, by floating or sinking in cold water, or by swallowing a piece of consecrated bread."† Mr. Chute‡ seeks to connect it with the power assumed by the Court of Chancery, in defiance of the common law, of imprisoning for contempt of Court.

The common lawyers in the House of Commons viewed with considerable alarm the sweeping powers confided to the Judges by the Judicature Act of 1873, and the present measure. It was in deference to this feeling that the following subsection of clause 33 was left out:—"There shall be repealed, from and after the date at which any Order in Council, or Rule of Court, or Order of the Lord Chancellor, made in pursuance of or for the purposes of this Act is made, any provision of any Act of Parliament inconsistent with such Order in Council, Rule of Court, or Order of the Lord Chancellor." It was in deference to this feeling that the Queen in Council was deprived (if she has been deprived) of the power regulating all matters connected with "forms of actions," "evidence," and "mode of trial," which was conferred upon her by subsection (2) of section 17, as it came down from the Lords. It was in deference to this feeling that the 4th section was ultimately settled so as to exclude from the possibility of being invited to sit as "Additional Judges" in the Court of Appeal, the members of the Chancery Division of the High Court. Lastly, it was in deference to the same feeling that the amendment of Mr. Watkin Williams, which forms the present section, was embodied in this Act.§

* Hallam's Middle Ages, Vol. II, p. 328 n (r), 12th edition.

† Ibid. Vol. III, p. 294.

‡ p. 155.

§ As the amendment originally stood, it had in the margin the following references:—13 Ed. 1, st. 1, c. 31; 3 and 4 Vict. c. 65, s. 15; 15 and 16 Vict., c. 76, s. 184; 20 and 21 Vict., c. 85, s. 39; 22 and 23 Vict., c. 21; 23 and 24 Vict., c. 144, s. 1. These references have been omitted in the Act as printed by the Queen's printer. They connected the amendment with the abolition of Bills of Exceptions by Order LVIII., Rule 1, *infra*.

SECTION 23.—*Regulation of Circuits.*

Her Majesty may at any time after the passing of this Act, and from time to time, by Order in Council, provide in such manner and subject to such regulations as to Her Majesty may seem meet, for all or any of the following matters :

1. For the discontinuance, either temporarily or permanently, wholly or partially, of any existing Circuit, and the formation of any new Circuit by the union of any counties or parts of counties, or partly in one way and partly in the other, or by the constitution of any county or part of a county to be a Circuit by itself ; and, in particular, for the issue of commissions for the discharge of civil and criminal business in the county of Surrey to the Judges appointed to sit for the trial by jury of causes and issues in Middlesex or London, or any of them ; and
2. For the appointment of the place or places at which Assizes are to be holden on any Circuit ; and
3. For altering, by such authority and in such manner as may be specified in the Order, the day appointed for holding the Assizes at any place on any Circuit in any case, where, by reason of the pressure of busi-

ness or other unforeseen cause, it is expedient to alter the same ; and

4. For the regulation, so far as may be necessary for carrying into effect any Order under this section, of the venue in all cases, civil and criminal, triable on any Circuit or elsewhere.

Her Majesty may from time to time, by Order in Council, alter, add to, or amend any Order in Council made in pursuance of this section ; and in making any Order under this section may give any directions which it appears to Her Majesty to be desirable to give for the purpose of giving full effect to such Order.

Provided that every Order in Council made under this section shall be laid before each House of Parliament within such time, and shall be subject to be annulled in such manner as is in this Act provided.

Any Order in Council purporting to be made in pursuance of this section shall have the same effect in all respects as if it were enacted in this Act.

The power hereby given to Her Majesty shall be deemed to be in addition to and not in derogation of any power already vested in Her Majesty in respect of the matters aforesaid ; and all enactments in relation to Circuits, or the places at which Assizes are to be holden or otherwise to relation to the subject-matter of any

Order under this section, shall, so far as such enactments are inconsistent with such Order, be repealed thereby, whether such repeal is thereby expressly made or not ; but all enactments relating to the power of Her Majesty to alter the Circuits of the Judges, or places at which assizes are to be holden, or the distribution of revising barristers among the Circuits, or otherwise enabling or facilitating the carrying the objects of this section into effect, and in force at the time of the passing of the Principal Act, shall continue in force, and shall with the necessary variations, if any, apply, so far as they are applicable, to any alterations in or dealings with Circuits, or places at which Assizes are to be holden, made or to be made after the passing of this Act, or to any other provisions of any Order made under this section ; and if any such Order is made for the issue of commissions for the discharge of civil and criminal business in the county of Surrey, as before mentioned in this section, that county shall for the purpose of the application of the said enactments be deemed to be a Circuit, and the senior Judge for the time being so commissioned, or such other Judge as may be for the time being designated for that purpose by Order in Council shall, in the month of July or August in every year, appoint the revising barristers for that county and the cities and boroughs therein.

The expression “ Assizes ” shall in this section

be construed to include sessions under any commission of Oyer and Terminer, or Gaol Delivery, or any commission in lieu thereof issued under the principal Act.

This section is substituted for section 68 of the Principal Act, subsection 2, repealed by the 33rd section, and the second Schedule to the present Act.

The Judicature Commission, in their First Report,* thus referred to the subject of the re-arrangement of circuits:—

“The necessity for holding Assizes in every county, without regard to the extent of the business to be transacted in each county, leads, in our judgment, to a great waste of judicial strength, and a great loss of time in going from one circuit town to another, and causes much unnecessary cost and inconvenience to those whose attendance is necessary or customary at the Assizes.

“The distribution of a small amount of business among a large number of circuit towns is the cause of serious evil to the suitors. From the impossibility of ascertaining beforehand with accuracy the business likely to arise, the time allotted to some towns often proves insufficient, and complaints arise that the trial of causes is hurried, or that the parties are driven to dispose of their cases by reference, or otherwise, unless they submit to the loss and inconvenience of having their causes postponed until the next Assizes. The expense and trouble of bringing together Judges, sheriffs, and grand jurors, and the time occupied in the preliminaries of an Assize, are the same at a small place, where there is but little business, as at a large one. The number of jurors, special and common, required to be in attendance, is much increased by the limited extent of the existing Assize Districts. If those Districts were enlarged, a juror, who had once attended at the Assizes, would probably be relieved from future attendance for a considerable time.

“We are, therefore, of opinion that the judicial business of the country should no longer be arranged and distributed according to the accidental division of counties, but that the venue for trials should be enlarged, and that several

* P. 17.

counties should be consolidated into Districts of a convenient size,—that such Districts should for all purposes of trial at the Assizes, both in civil and criminal cases, be treated as one venue or county,—and that all counties of towns or cities should for the purposes of such Districts be included in an adjacent District or county.

“In arranging the Circuits, we think that they should be so remodelled as to render the amount of business likely to be transacted on each Circuit as nearly equal as may be practicable ; and in fixing the towns in which the Assizes should be held, we recommend that those towns should be chosen which are the most central,—with which there is the best and most rapid railway communication from all parts of the District,—and to which the inhabitants are most in the habit of resorting for the purposes of business. We may add, that, after deducting the counties now forming the Home Circuit, we have reason to think that six Circuits for England and Wales would be found sufficient.”

The following is a copy of the recommendations of the Judges as to Circuits, printed by order of the House of Commons :—

“1. The Circuits of the Judges shall be as follows :

“I. The North-Western Circuit, which shall include the counties of Westmorland, Cumberland, and Lancaster.

“II. The North-Eastern Circuit, which shall include the counties of Northumberland, Durham, and York.

“III. The Midland Circuit, which shall include the counties of Lincoln, Derby, Nottingham, Warwick, Leicester, Northampton, Rutland, Buckingham, and Bedford.

“IV. The Norfolk Circuit, which shall include the counties of Norfolk, Suffolk, Huntingdon, Cambridge, Hertford, Essex, Kent, and Sussex.

“V. The Oxford Circuit, which shall include the several counties and cities heretofore included in the Oxford Circuit.

“VI. The Western Circuit, which shall include the several counties and cities heretofore included in the Western Circuit.

“VII. The North and South Wales Circuit, which and each of the divisions whereof (that is to say, the North

Wales and the South Wales divisions), shall include the several counties heretofore included therein respectively. But two Judges shall hold the Assizes for the county of Glamorgan instead of one.

“2. No Assizes shall be held in or for the county of Surrey.

“3. The Judges of Assize for any county or city may, by Order, adjourn the opening of such Assizes at any time, and for such period as they may deem to be necessary or expedient.”*

It will be seen that the Judges recommend that there shall be seven Circuits—not six, as proposed by the Judicature Commission.†

Much opposition has been offered to the proposal to abolish the Home Circuit, and to the recommendation of the Judges, that “no Assizes shall be held in or for the county of Surrey.”

Memorials from Birmingham, Plymouth, Leeds and Kendal, and also from an influential committee of members of the Northern Circuit, with regard to the rearrangement of circuits, will be found in the second Appendix to the Fifth (and Final) Report of the Judicature Commission.

“All enactments shall continue in force.” This refers to the 3 and 4 Wm. IV., c. 71, to the 26 and 27 Vict. c. 122—giving power to alter any of the Circuits to Her Majesty in Council—and to the 30 and 31 Vict. c. 70, giving power to alter the number of Revising Barristers on any Circuit.

The last-mentioned measure, which was passed by the writer,‡ was rendered necessary by the abolition of the office of Assistant-Revising Barrister, by the 35 and 36 Vict. c. 84, s. 1.

The latter enactment might have led to a deadlock in the Revision Court, as the stereotyped number of Revising Barristers fixed by s. 28 of the 6 and 7 Vict. c. 18, could not, without fresh legislation, be increased; and that number, without assistants, was inadequate.

* Return to an Order of the House of Commons, dated 31st July, 1874.

† It has been suggested that Lancashire should form a separate Circuit.

‡ The present Lord Chancellor (then in Opposition) kindly took charge of it in the House of Lords.

The powers conferred by the 36 and 37 Vict., c. 70, were exercised by Mr. Justice Brett at the Liverpool Assizes. He appointed three new Revising Barristers under that Act, for the Northern Circuit.

SECTION 24.—*Additional power as to regulation of Practice and Procedure by Rules of Court.*

Where any provisions in respect of the practice or procedure of any Courts the jurisdiction of which is transferred by the Principal Act or this Act to the High Court of Justice or the Court of Appeal, are contained in any Act of Parliament, Rules of Court may be made for modifying such provisions to any extent that may be deemed necessary for adapting the same to the High Court of Justice and the Court of Appeal, without prejudice nevertheless to any power of the Lord Chancellor, with the concurrence of the Treasury, to make any Rules with respect to the Paymaster General, or otherwise.

Any provisions relating to the payment, transfer, or deposit into, or in, or out of any Court of any money or property, or to the dealing therewith, shall, for the purposes of this section, be deemed to be provisions relating to practice and procedure.

The Lord Chancellor, with the concurrence of the Treasury, may from time to time, by Order, determine to what accounts and how intituled any such money or property as last aforesaid, whether paid, transferred, or deposited before or

after the commencement of this Act, is to be carried, and modify all or any forms relating to such accounts; and the Governor and Company of the Bank of England, and all other companies, bodies corporate, and persons shall make such entries and alterations in their books as may be directed by the Lord Chancellor, with the concurrence of the Treasury, for the purpose of carrying into effect any such Order.

This is one of the transition clauses of this Act.

SECTION 25.—*Orders and Rules to be laid before Parliament, and may be annulled on Address from either House.*

Every Order in Council and Rule of Court required by this Act to be laid before each House of Parliament shall be so laid within forty days next after it is made, if Parliament is then sitting, or if not, within forty days after the commencement of the then next ensuing Session; and if an Address is presented to Her Majesty by either House of Parliament, within the next subsequent forty days on which the said House shall have sat, praying that any such Rule or Order may be annulled, Her Majesty may thereupon by Order in Council annul the same; and the Rule or Order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same.

This section shall come into operation immediately on the passing of this Act.

This section is substituted for the last paragraph of section 68 of the Principal Act, which is repealed by section 33 and Schedule 2 of this Act. The last paragraph of the 68th section of the Principal Act is re-enacted *verbatim* by the present section, except that Orders in Council are included as well as Rules of Court.

This is one of the sections expressly excepted from the operation of the first clause of section 2, *supra*.

The Additional Rules of Court issued by Her Majesty in Council on the 12th of August, 1875, might have been laid on the table of either House of Parliament the next day, which happened to be the last day of the session, and on which no business was transacted, and as Parliament was prorogued till October, 1875, it would have been impossible for any noble lord or new member to move an Address within 40 days, praying that the Additional Rules might be annulled. But this course does not seem to have been adopted.* Meanwhile, the new Rules come in force on the 1st of November, 1875, subject to be "annulled."

SECTION 26.—*Fixing and collection of fees in High Court and Court of Appeal.*

The Lord Chancellor, with the advice and consent of the judges of the Supreme Court or any three of them, and with the concurrence of the Treasury, may, either before or after the commencement of this Act, by Order, fix the fees and per-centages (including the per-centage on estates of lunatics) to be taken in the High Court of Justice or in the Court of Appeal, or in any Court created by any commission or in any office which is connected with any of those courts, or

* The writer has searched the votes for August 13th, 1875, but cannot find any mention of the new Rules in them.

in which any business connected with any of those courts is conducted, or by any officer paid wholly or partly out of public moneys who is attached to any of those courts or the Supreme Court, or any Judge of those courts, including the Masters and other Officers in Lunacy, and may from time to time by Order increase, reduce, or abolish all or any of such fees and per-centages, and appoint new fees and per-centages to be taken in the said Courts or offices or any of them, or by any such officer as aforesaid.

Any Order made in pursuance of this section shall be binding on all the Courts, offices, and officers to which it refers, in the same manner as if it had been enacted by Parliament.

All such fees and per-centages shall (save as otherwise directed by the Order) be paid into the receipt of Her Majesty's Exchequer and be carried to the Consolidated Fund, and with respect thereto the following Rules shall be observed :

- (1.) The fees and per-centages shall, except so far as the Order may otherwise direct, be taken by stamps, and if not taken by stamps shall be taken, applied, accounted for, and paid over in such manner as may be directed by the Order.
- (2.) Such stamps shall be impressed or adhesive, as the Treasury from time to time direct.
- (3.) The Treasury, with the concurrence of the Lord Chancellor, may from time to time make such Rules as may seem fit for

publishing the amount of the fees and regulating the use of such stamps, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for insuring the proper cancellation of stamps and for keeping accounts of such stamps.

- (4.) Any document which ought to bear a stamp in pursuance of this Act, or any Rule or Order made thereunder, shall not be received, filed, used, or admitted in evidence unless and until it is properly stamped, within the time prescribed by the Rules under this section regulating the use of stamps, but if any such document is through mistake or inadvertence received, filed, or used without being properly stamped, the Lord Chancellor or the Court may, if he or it shall think fit, order that the same be stamped as in such Order may be directed.
- (5.) The Commissioners of Inland Revenue shall keep such separate accounts of all money received in respect of stamps under this Act, as the Treasury may from time to time direct and subject to the deduction of any expenses incurred by those Commissioners in the execution of this section, the money so received shall, under the

direction of the Treasury, be carried to and form part of the Consolidated Fund.

- (6.) Any person who forges or counterfeits any such stamp, or uses any such stamp, knowing the same to be forged or counterfeit, or to have been previously cancelled or used, shall be guilty of forgery, and be liable on conviction to penal servitude for a term not exceeding seven years, or to imprisonment with or without hard labour for a term not exceeding two years.

An Order under this section may abolish any existing fees and per-centages which may be taken in the said courts or offices, or any of them, or by the said officers or any of them, but subject to the provisions of any Order made in pursuance of this section, the existing fees and per-centages shall continue to be taken, applied, and accounted for in the existing manner.

The provisions of subsections (2), (3), (4), (5) of this section are copied from the Common Law Courts (Fees) Act, 1865,* ss. 2, 3, 4, and 6, respectively, with this difference, that the Rules mentioned in subsection (3) are to be made with the concurrence of the Lord Chancellor, instead of with that of the three Chiefs of the Common Law, and that in subsection (4) the Lord Chancellor is substituted for a Judge of one of the Superior Courts of Common Law. See also 32 and 33 Vict., c. 91, ss. 19, 20, 21, 22, and 23.

“The per-centage on estates of lunatics.”† All fees on proceedings in lunacy throughout the several offices of the Courts are now, under the Lunacy Regulation Act, 1853, except those mentioned in s. 29 of that Act, abolished, and

* 28 and 29 Vict., c. 45.

† See Elmer on Lunacy Practice, c. 19.

in lieu thereof, a per-centage on the clear annual income of each lunatic's estate is to be paid (s. 26) at the rate of £4 per cent. for each clear annual income amounting to £100, and under £1,000 ; at the rate of £3 per cent. for each clear annual income amounting to £1,000 and under £5,000 ; and at the rate of £2 per cent. for each clear annual income amounting to £5,000 and upwards, subject to the restrictions therein mentioned as to the total amount payable in each class. All incomes under £100 are exempt from paying any per-centage. By s. 30, the Lord Chancellor may, with the advice and assistance of the Lords Justices, from time to time, reduce and raise (but not to higher rates than those above-mentioned) the rate of per-centage.* The per-centage and fees are collected by means of stamps (s. 31).

SECTION 27.—*Provisions as to Lancaster Fee Fund, and salaries, &c., of officers of courts at Lancaster and Durham. 32 and 33 Vict. c. 37.*

Whereas by the Common Pleas at Lancaster Amendment Act, 1869, the fees taken by the Prothonotaries and District Prothonotaries in pursuance of that Act, are directed to be carried to the credit of "the Prothonotaries Fee Fund Account of the County Palatine of Lancaster," and certain salaries and expenses connected with the offices of the said Prothonotaries and District Prothonotaries, are directed to be paid out of that account :

And whereas, on the twenty-fourth day of June one thousand eight hundred and seventy-four, there was standing to the credit of that account a sum of ten thousand seven hundred and fifty-five pounds, consolidated three pounds per cen-

* See also 15 and 16 Vict., c. 87, s. 14.

tum bank annuities and one thousand eight hundred and ten pounds cash, or thereabouts :

And whereas the fees received in the Court of Pleas of Durham are applied in payment of disbursements connected with the office of the Prothonotary of that Court, and any surplus of such fees is paid into the Receipt of Her Majesty's Exchequer, and any deficiency of the amount of the said fees to pay such disbursements is charged on the Consolidated Fund of the United Kingdom :

And whereas after the commencement of the Principal Act, the jurisdiction of the Court of Common Pleas at Lancaster and the Court of Pleas at Durham is by that Act transferred to and vested in the High Court of Justice, and it is expedient to make further provision respecting the expenses of those Courts and the said stock and cash standing to the credit of the Prothonotaries' Fee Fund Account of the County Palatine of Lancaster :

Be it therefore enacted that—

After the commencement of the Principal Act there shall be paid out of moneys provided by Parliament such sums by way of salary or remuneration to the Prothonotaries and District Prothonotaries of the Court of Common Pleas at Lancaster and the Court of Common Pleas at Durham and their clerks, and such sums for rent, taxes, and other outgoings at their offices, as the

Lord Chancellor, with the concurrence of the Treasury, may from time to time direct.

As soon as each Prothonotary and District Prothonotary of the Court of Common Pleas at Lancaster has accounted for and paid all fees and moneys which he shall have received by virtue of his said office, the Chancellor of the Duchy of Lancaster shall cause any security given by such officer in pursuance of section seventeen of the Common Pleas at Lancaster Amendment Act, 1869, to be cancelled, and delivered up, or otherwise discharged.

As soon as may be after the commencement of the Principal Act the Treasury and the Chancellor of the Duchy and County Palatine of Lancaster shall ascertain the amount of stock and cash standing to the credit of the Prothonotaries' Fee Fund Account of the County Palatine of Lancaster, after paying thereout to the Receiver General of the revenues of the Duchy of Lancaster the amount of the fees remaining in the Prothonotary's hands on the twenty-fourth day of October, one thousand eight hundred and sixty-nine, and paid to that account in pursuance of section seventeen of the last-mentioned Act, and all other sums justly due to Her Majesty in right of Her said Duchy and County Palatine; and the Treasury shall by warrant direct the Governor and Company of the Bank of England to transfer to the Commissioners for the Reduction of the National

Debt the amount of stock and cash so ascertained and either to cancel the stock in their books or otherwise dispose of the same as may be directed by the warrant; and the Governor and Company of the Bank of England shall transfer the stock and cash, and cancel or otherwise dispose of the stock according to the warrant, without any order from the Lord Chancellor or the Chancellor of the said Duchy and County Palatine or any other person.

The Commissioners for the Reduction of the National Debt shall apply all cash transferred to them in pursuance of this section in the purchase of Bank Annuities which shall be cancelled or otherwise disposed of in like manner as the said stock.

See sections 17 and 18 of the statute 32 & 33 Vict., c. 37. Section 16 of the Principal Act transfers to and vests in the High Court of Justice the jurisdiction of the Common Pleas of Lancaster and the Court of Pleas of Durham. By the second Order in Council of the 12th August, 1875, the District Prothonotaries at Liverpool, Manchester, and Preston are appointed District Registrars for the respective places for which they are District Prothonotaries, and it is provided that "the District for each place shall be the District now assigned to each such District Prothonotary, under 'the Common Pleas at Lancaster Amendment Act, 1869.'" The District Prothonotaries of Lancaster will, therefore, occupy a position very similar to that which they have hitherto occupied, their previous duties, powers, authorities, and remuneration being distinctly preserved to them by the 78th section of the Principal Act.

The same observations apply to the District Prothonotary of the Court of Pleas at Durham.

SECTION 28.—*Annual Account of Fees and Expenditure.*

The Treasury shall cause to be prepared annually an account for the year ending the thirty-first day of March, showing the receipts and expenditure during the preceding year in respect of the High Court of Justice and the Court of Appeal, and of any Court, office, or officer, the fees taken in which or by whom can be fixed in pursuance of this Act.

Such account shall be made out in such form and contain such particulars as the Treasury, with the concurrence of the Lord Chancellor, may from time to time direct.

Every officer by whom or in whose office fees are taken which can be fixed in pursuance of this Act, shall make such returns and give such information as the Treasury may from time to time require for the purpose of enabling them to make out the said account.

The said account shall be laid before both Houses of Parliament within one month after the thirty-first day of March in each year, if Parliament is then sitting, or, if not, then within one month after the next meeting of Parliament.

The provisions of this section are copied from the following enactments:—29 & 30 Vict., c. 101, s. 7; 30 & 31 Vict., c. 122, ss. 1-8; and 32 & 33 Vict., c. 91, s. 24.

SECTION 29.—*Amendment of law as to payments to senior Puisne Judge of Queen's Bench, and Queen's Coroner.*

Whereas fines and other moneys paid into the Court of Queen's Bench for Her Majesty's use are received by the Queen's Coroner and Attorney, and out of such moneys there is paid in pursuance of a writ of Privy Seal an annual sum of forty pounds, at the rate of ten pounds for every term, to the second Judge of the Court of Queen's Bench, and by section seven of the Act of the sixth year of King George the Fourth, chapter eighty-four, it is enacted that the said termly allowance of ten pounds shall continue to be paid to the said second Judge in addition to his salary :

And whereas out of the said moneys there is also payable in pursuance of the said writ of Privy Seal an annual sum of ten pounds to the Queen's Coroner and Attorney :

And whereas it is expedient to determine such payments :

Be it therefore enacted as follows :

After the passing of this Act the said sums of forty pounds and ten pounds a year shall cease to be payable by the Queen's Coroner and Attorney out of the above-mentioned moneys.

So long as the person who, on the first day of March, one thousand eight hundred and seventy-five, was the second Judge of the Court of

Queen's Bench continues to be such second Judge, there shall be payable to him out of the Consolidated Fund of the United Kingdom the annual sum of forty pounds in addition to his salary, and that annual sum shall be payable to him by instalments of ten pounds at the like times at which the said termly allowance of ten pounds has heretofore been payable to him, or at such other times as the Treasury, with the consent of the Judge, may direct.

So long as the person who, on the first day of March, one thousand eight hundred and seventy-five, was the Queen's Coroner and Attorney continues to hold that office, there shall be payable to him out of moneys provided by Parliament the annual sum of ten pounds, and such sum shall be payable to him at the like time at which the said annual sum of ten pounds has heretofore been payable to him, or at such other time as the Treasury, with the consent of such Queen's Coroner or Attorney, may direct.

See 6th George IV., chapter 84, section 7, which is repealed by section 33, and the second Schedule to this Act.

SECTION 30.—*Amendment of 35 and 36 Vict., c. 44, as to the transfer of Government securities to and from the Paymaster-General on behalf of the Court of Chancery and the National Debt Commissioners.*

Whereas by section sixteen of "The Court of

Chancery Funds, Act, 1872," it is enacted that an Order of the Court of Chancery may direct securities standing to the account of the Paymaster-General on behalf of the Court of Chancery to be converted into cash, and that where such Order refers to Government securities such securities shall be transferred to the Commissioners for the Reduction of the National Debt in manner therein mentioned :

And whereas the said section contains no provision for the converse cases of the conversion of cash into securities and the transfer of securities from the said Commissioners to the account of the Paymaster-General on behalf of the Court of Chancery :

And whereas such conversion and transfer, and the other matters provided by the said section can be more conveniently provided for by Rules made in pursuance of section eighteen of the said Act ; and it is expedient to remove doubts with respect to the power to provide by such Rules for the investment in securities of money in Court, and the conversion into money of securities in Court :

Be it therefore enacted as follows :

Section sixteen of "The Court of Chancery Funds Act, 1872," is hereby repealed.

Rules may from time to time be made in pursuance of section eighteen of "The Court of Chancery Funds Act, 1872," with respect to the

investment in securities of money in Court, and the conversion into money of securities in Court, and with respect to the transfer to the Commissioners for the Reduction of the National Debt of Government securities ordered by the Court to be sold or converted into cash, and to the transfer by those Commissioners to the Paymaster-General for the time being on behalf of the Court of Chancery of Government securities ordered by the Court of Chancery to be purchased.

This section shall come into operation on the passing of this Act, and shall be construed together with "The Court of Chancery Funds Act, 1872," and shall be subject to any alteration in that Act made by or in pursuance of the Principal Act or this Act.

This section comes within the exception of section 2, *supra*. This section (which is not very germane to the subject-matter of the Act) was inserted in Committee, in the House of Commons.

SECTION 31.—*Abolition of secretary to the Visitors of Lunatics, 16 and 17 Vict. c. 70.*

Whereas under the Lunacy Regulation Act, 1853, it is provided that there shall be a secretary to the Visitors of Lunatics therein-mentioned, and it is expedient to abolish that office : Be it therefore enacted as follows :—

After the passing of this Act there shall cease to be a secretary to the Visitors of Lunatics.

The Treasury shall award, out of moneys pro-

vided by Parliament, to the person who holds at the passing of this Act the office of secretary to the Visitors of Lunatics such compensation by way of annuity or otherwise, as having regard to the conditions on which he was appointed to his office, the nature, salary, and emoluments of his office, and the duration of his services, they may think just and reasonable, so that the same be granted in accordance with the provisions and subject to the conditions contained in the Superannuation Act, 1859.

This section took effect on the 13th August, 1875. By s. 22 of the statute 16 and 17 Vict. c. 70, "there shall be a secretary to the Visitors, who shall hold office during pleasure, and the Lord Chancellor shall from time to time, as a vacancy shall occur in the office of secretary, appoint, by writing under his hand, a fit person to fill the vacancy."

SECTION 32.—*Amendment of 32 and 33 Vict., c. 83, s. 19, and 32 and 33 Vict., c. 71, s. 116, as to payment of unclaimed dividends to persons entitled.*

Whereas by section nineteen of "The Bankruptcy Repeal and Insolvent Court Act, 1869," it is enacted as follows: "All dividends declared in
 "any court acting under the Acts relating to bank-
 "ruptcy or the relief of insolvent debtors which
 "remain unclaimed for five years after the com-
 "mencement of this Act, if declared before that
 "commencement, and for five years after the
 "declaration of the dividends if declared after the
 "commencement of this Act, and all undivided

“surpluses of estates administered under the juris-
 “diction of such court which remain undivided for
 “five years after the declaration of a final dividend
 “in the case of bankruptcy, or for five years after
 “the close of an insolvency under this Act, shall be
 “deemed vested in the Crown, and shall be dis-
 “posed of as the Commissioners of Her Majesty’s
 “Treasury direct; provided that any time after
 “such vesting the Lord Chancellor may, if he
 “think fit, by reason of the disability or absence
 “beyond seas of the person entitled to the sum so
 “vested, or for any other reason appearing to him
 “sufficient, direct that the sum so vested shall be
 “repaid out of moneys provided by Parliament, and
 “shall be distributed as it would have been if there
 “had been no such vesting :”

And whereas a similar enactment with respect
 to unclaimed dividends in bankruptcy was made
 by section one hundred and sixteen of “The
 Bankruptcy Act, 1869 :”

And whereas it is expedient to give to persons
 entitled to any such unclaimed dividends or other
 sums greater facilities for obtaining the same :
 Be it therefore enacted as follows :—

Any court having jurisdiction in the matter of
 any bankruptcy or insolvency, upon being satisfied
 that any person claiming is entitled to any
 dividend or other payment out of the moneys
 vested in the Crown in pursuance of section nine-
 teen of “The Bankruptcy Repeal and Insolvent

Court Act, 1869," or of section one hundred and sixteen of "The Bankruptcy Act, 1869," may order payment of the same in like manner as it might have done if the same had not by reason of the expiration of five years become vested in the Crown in pursuance of the said sections.

This section shall take effect as from the passing of this Act.

This section, which is not very germane to the subject-matter of the Act (especially as by s. 9 *supra*, the London Court of Bankruptcy is to remain distinct from the Supreme Court) was inserted in Committee in the House of Commons.* By the second Schedule the provisoes to s. 116 of the Bankruptcy Act, 1869, and to s. 19 of the Bankruptcy Repeal and Insolvent Act, respectively, are repealed.

SECTION 33.—*Repeal.*

From and after the commencement of this Act there shall be repealed—

- (1.) The Acts specified in the second Schedule to this Act, to the extent in the third column of that Schedule mentioned, without prejudice to anything done or suffered before the said commencement under the enactments hereby repealed; also
- (2.) Any other enactment inconsistent with this Act or the Principal Act.

In addition to the enactments specified in the Schedule there are repealed by this Act—

By s. 3, *supra*, s. 5 of the Principal Act from "provided" to "21."

By s. 4, *supra*, s. 54 of the Principal Act.

* The "new clauses" 30 & 32 make the Act somewhat in the nature of, what is termed, an "omnibus" one.

By s. 10, *supra*, subsection (1) of section 25 of the Principal Act.

By s. 33, *supra*, s. 16 of "The Chancery Funds Act, 1872," (35 and 36 Vict., c 44,) and

By s. 31 (impliedly), s. 22 of the Lunacy Regulation Act, 1862 (16 and 17 Vict., c. 70).

As this section was sent down from the Lords, it contained another subsection (3):—

"(3.) From and after the date at which any Order in Council or Rule of Court, or Order of the Lord Chancellor, made in pursuance of or for the purposes of this Act is made, any provision of any Act of Parliament inconsistent with such Order in Council, Rule of Court, or Order of the Lord Chancellor."

SECTION 34.—*As to Vacancies in any Office within s. 77 of Principal Act.*

Whereas, by the seventy-seventh section of the Principal Act, it is provided that, upon the occurrence of a vacancy in the office of any officer coming within the provisions of the said section, the Lord Chancellor, with the concurrence of the Treasury, may, in the event of such office being considered unnecessary, abolish the same, or may reduce the salary, or alter the designation or duties thereof, notwithstanding that the patronage thereof may be vested in an existing Judge; but that nothing in the said Act contained shall interfere with the office of marshal attending any commissioner of Assize: And whereas it is expedient to add to the said section: Be it enacted, that, upon the occurrence of any vacancy coming within the provisions of the said section, an appointment shall not be made thereto for the period

of one month without the assent of the Lord Chancellor, given with the concurrence of the Treasury; and, further, the Lord Chancellor may, with the concurrence of the Treasury, suspend the making any appointment to such office for any period not later than the first day of January, One thousand eight hundred and seventy-seven, and may, if it be necessary, make provision in such manner as he thinks fit for the temporary discharge, in the meantime, of the duties of such office.

See s. 77 of the Principal Act and the note thereto.

SECTION 35.—*Amendment of Principal Act,
s. 79, as to Chamber Clerks.*

Be it enacted, that any person who, at the time of the commencement of this Act, shall hold the office of Chamber Clerk shall be eligible at any time thereafter for appointment to the like office, anything in the Principal Act to the contrary notwithstanding; and that, if any such person shall be so appointed after the commencement of this Act, he shall, if the salary assigned to such office by or under the Principal Act be less than the salary received by him at the time of the commencement of this Act, be entitled to receive a salary not less than that so formerly received by him, so long as he shall retain such office, but shall not be entitled to receive or claim any pension in respect of his service, unless the Treasury

in its absolute discretion, shall think fit to sanction the same.

The Chamber Clerks of the Judges occupy a nominally insecure, but really secure position. They hold their appointments under the 15 and 16 Vict., c. 73, s. 8, by which it is enacted that "it shall be lawful for the Lord Chief Justice and the Lord Chief Baron each to appoint three clerks; and for the other Justices and Barons each to appoint two clerks, and such officers shall hold their offices during the pleasure of the Judges by whom they are appointed, and if continued by their successors, during the pleasure of such successors." The two clerks are a "Body" Clerk and a "Chamber" Clerk. The succeeding Judges almost invariably reappoint the Chamber Clerks of their predecessors, the knowledge and skill, which a Chamber Clerk of standing can bring to bear on many knotty points of practice, being invaluable to the incoming Judge.

The 79th section of the Principal Act severed the connection established by the legislature between the Chamber Clerks and the Judges, empowering the Judges to appoint two clerks, a senior and a junior, at salaries much lower than those enjoyed by the Body Clerk and Chamber Clerk.

The existing Chamber Clerks were not referred to at all in the 79th section, but it was declared that "the duties of Chamber Clerks, so far as relates to business transacted in Chambers by Judges appointed after the passing of this Act, shall be performed by officers of the Court in the permanent Civil Service of the Crown."

This proviso evidently shut out the Chamber Clerks from all hope of being reappointed on the death or retirement of Judges who respectively appointed them. In 1873 the writer had taken some part in bringing the claims of the Chamber Clerks, under the notice of the then Attorney-General, Sir John (now Lord) Coleridge, and when the present measure was brought forward, the writer was requested to take up their case. Accordingly he placed the following new clause on the paper:—

"Whereas, by the Act of the fifteenth and sixteenth years of Her present Majesty, chapter seventy-three, it is

enacted, "That the Chamber Clerks to the Judges shall
"hold their offices during the pleasure of the Judges by whom
"they are appointed; or, if continued by the successors
"of such Judges, during the pleasure of such successors :

"And whereas the Chamber Clerks to the Judges appointed in pursuance of the said enactment have usually
"been continued by the successors of the Judges by whom
"they have been appointed :

And whereas, by the seventy-ninth section of the Principal Act, it is enacted : 'That the duties of Chamber Clerks, so far as relates to business transacted in Chambers by Judges appointed after the commencement of that Act, shall be performed by Officers of the Court in the permanent Civil Service of the Crown,' and no provision is made in the Principal Act for continuing the existing Chamber Clerks to the Judges in their respective offices after the death or retirement of the Judges by whom they were respectively appointed :

Be it enacted, That, upon the death or retirement of any of the existing Judges, the Chamber Clerk appointed by him shall be eligible to be continued in the office of Chamber Clerk, anything in the Principal Act to the contrary notwithstanding."

The Attorney-General and the Financial Secretary of the Treasury (Mr. W. H. Smith, M.P.) carefully considered the question, and the Attorney-General adopted the enacting part of the above new clause with a slight variation in phraseology, adding words which preserve the salaries of the existing Chamber Clerks from being reduced :—

"Be it enacted, That any person who, at the time of the commencement of this Act, shall hold the office of Chamber Clerk shall be eligible at any time thereafter for appointment to the like office, anything in the Principal Act to the contrary notwithstanding; and that, if any such person shall be so appointed after the commencement of this Act, he shall, if the salary assigned to such office by or under the Principal Act be less than the salary received by him at the time of the commencement of this Act, be entitled to receive a salary not less than that formerly received by him so long as he shall retain such office, but

shall not be entitled to receive or claim any pension in respect of his service."

The words "Be it enacted that" formed, in the writer's new clause, a connecting link between the recital and the enacting part; but they are surplusage in their present position.

It seemed somewhat hard that the Chamber Clerks, some of whom had served for thirty and one for fifty years, should be entirely debarred from ever applying for a pension. Accordingly, the writer gave notice of the following amendment to the Attorney-General's new clause:—

"As an amendment to Mr. Attorney-General's proposed new clause as to Chamber Clerks, at end add, 'unless the Treasury, in its absolute discretion, shall think fit to sanction the same.'"

The writer called the attention of Mr. W. H. Smith and of the Attorney-General to this amendment, and left town for Circuit. On his return he was no little gratified to find that his amendment had been adopted by the Government. It now, as will be perceived, forms part of the present section.

FIRST SCHEDULE.

RULES OF COURT.*

[NOTE.—*Where no other provision is made by the Act or these Rules the present Procedure and Practice remain in force.*]

This is the Schedule referred to in section 16 of this Act:—

“The Rules of Court in the first Schedule to this Act, shall come into operation at the commencement of this Act, and as to all matters to which they extend shall thenceforth regulate the proceedings in the High Court of Justice and Court of Appeal. But such Rules of Court and also all such other Rules of Court (if any) as may be made after the passing and before the commencement of this Act under the authority of the next section† may be annulled or altered by the authority by which new Rules of Court may be made after the commencement of this Act.”

The authority by which new rules may be made after the commencement of the Act is (section 17) “the Supreme Court, with the concurrence of a majority of the Judges thereof present at any meeting for that purpose held (of which majority the Lord Chancellor shall be one.)” This is in accordance with the recommendation of the Judicature Commission‡ that “power should be vested in the Supreme Court to regulate, from time to time, the Procedure and Practice in all its Divisions.”

The Rules in this Schedule are derived from two sources:—

1. The Schedule (now repealed) to the Principal Act, as to which see section 69 of that Act and the note thereto (p. 134.)

2. The Rules framed in 1874 under the 68th section of the Principal Act, but which were not issued by authority.

It will be found that the Rules in this Schedule emanate from one or other of these sources, with which the practitioners and students of the law must by this time be familiar; and, in order to facilitate a reference to them, the writer has carefully noted up under every Rule of this Schedule the precise Rule of the Schedule to the Principal Act, or Order of the Rules of Court drawn up in 1874 under the Principal Act, from which it has been copied, with a view to its incorporation in this Schedule. The various provisions have, of course, been re-cast by the Legislature, in order to adapt them to the present Act.

The note at the head of this Schedule relative to existing Procedure

* The heading in the Bill, “Rules of Court, under the 36 and 37 Vict., c. 66,” was evidently erroneous, as the Rules are under *both* Acts. The heading was altered by the Attorney-General, at the instance of the writer.

† The new Rules made under section 17 before the commencement of the Act are inserted in this work after the Schedules to the present Act.

‡ First Report, p. 15.

(which is copied from the Rules of Court drawn up in 1874 under the Principal Act) carried out the principle embodied in the 21st section of this "Save as by the Principal Act or this Act, or by any Rules of Court, Act* :— may be otherwise provided, all forms and methods of Procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is by the Principal Act or this Act transferred to the said High Court and to the said Court of Appeal respectively, under or by virtue of any law, custom, general order, or rules whatsoever, and which are not inconsistent with the Principal Act or this Act, or with any Rules of Court, may continue to be used and practised in the said High Court of Justice and the said Court of Appeal respectively, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so transferred, if the Principal Act and this Act had not passed." One peculiarity of these Rules is that they re-enact many sections of the Common Law Procedure Acts almost verbatim ; and omit all allusion to the source from which they are derived. They also enact many of the Rules framed by the Judges without any allusion to those Rules. The question arises, what becomes of the sections of the Common Law Procedure Acts and of the *Regule Generales*, which are not expressly enacted or re-enacted in this Schedule? Are they repealed or rescinded by implication? It is apprehended that so far as the present Rules are inconsistent with them, the former Rules and enactments touching Procedure and Pleading must be taken to be, *pro tanto*, repealed ; but otherwise by virtue of section 21, to be still of full force and effect.

ORDER I.

FORM AND COMMENCEMENT OF ACTION.

Rule 1.

All actions which have hitherto been commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which have hitherto been commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an "action."

This rule is a re-enactment of the first part of Rule I. of the Principal Act.

* Re-enacting the repealed 73rd section of the Principal Act.

The Common Law denomination "action" has been adopted, in preference to the Equity term "suit;" but many of the proceedings appear to bear more resemblance to a "suit" than an "action." The jurisdiction of the Court of Common Pleas at Lancaster and of the Court of Pleas at Durham is to be transferred to the High Court by section 16 of the Principal Act.

Rule 2.

With respect to interpleader, the procedure and practice now used by Courts of Common Law under the Interpleader Acts, 1 & 2 Will. 4, c. 58, and 23 & 24 Vict., c. 126, shall apply to all actions and all the Divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons, and before delivering a defence.

This is Rule 5 of Order 1 of the Rules of Court drawn up in 1874, under the Principal Act.

The general principles recognised in the application of interpleader are (1) that the person applying that others may be required to interplead be already defendant in an action at the suit of one of them; (2) that the claims of both claimants be in respect of the very same matter; (3) that the party applying claim no interest in the subject-matter; (4), that the applicant be not colluding with either party; (5), that the applicant be in possession of the matter in dispute, and thus able to obey such order as may be made with regard to it; and (6), that the same question be raisable upon the interpleader issue, as was in dispute between the original parties. A sheriff may successfully apply for an interpleader order, as between execution creditors and persons claiming goods seized by the sheriff in execution, although no action has been commenced against him; provided that a *bonâ fide* legal claim has been actually made to goods lawfully seized.*

The Interpleader Acts will, under this Rule, apply for the first time to the Chancery Division.

The leading Act on Interpleader is the 1 & 2 Wm. IV., c. 58, referred to in the Rules, and which is as follows:—

"Whereas it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in Equity against the plaintiff and such third party, usually called a Bill of Interpleader, which is attended with expense and delay; for remedy thereof, Be it enacted by the King's Most Excellent Majesty, by and with the consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That upon application made by or on the behalf of any defendant sued in any of His Majesty's Courts of Law at Westminster, or in the Court of Common Pleas of the County Palatine of Lancaster,

* See Day's Common Law Procedure Acts, pp. 357-8, 4th edition. (1872.)

or the Court of Pleas of the County Palatine of Durham, in any action of assumpsit, debt, detinue, or trover, such application being made after declaration, and before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject-matter of the action in such manner as the Court (or any Judge thereof) may order or direct, it shall be lawful for the Court, or any Judge thereof, to make Rules and Orders calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such Rule or Order to hear the allegations as well as of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or with the consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims and determine the same in a summary manner, and to make such other Rules and Orders therein as to costs and all other matters as may appear to be just and reasonable.

II. The judgment in any such action or issue as may be directed by the Court or Judge, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them.

III. If such third party shall not appear under such Rule or Order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any Rule or Order to be made after appearance, it shall be lawful for the Court or Judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving, nevertheless, the right or claim of such third party against the plaintiff; and thereupon to make such Order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable.

IV. No Order shall be made in pursuance of Act by a single Judge of the Court of Pleas of the said County Palatine of Durham who shall not also be a Judge of one of the said Courts at Westminster, and every Order to be made in pursuance of this Act by a single Judge not sitting in open Court shall be liable to be rescinded or altered by the Court in like manner as other Orders made by a single Judge.

V. If upon application to a Judge, in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the Court, it shall be lawful for him to refer the matter to the Court; and thereupon the Court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by Rule of Court, instead of the Order of a Judge.

VI. And whereas difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said Courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons not being the parties against whom such process has issued, whereby Sheriffs and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such Sheriffs and other officers; Be it therefore further enacted, That when any such

claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the Court from which such process issued, upon application of such Sheriff or other officer made before or after the return of such process, and as well before as after any action brought against such Sheriff or other officer, to call before them, by Rule of Court, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claims and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case, and the costs of all such proceedings shall be in the discretion of the Court. VII. All rules, orders, matters, and decisions to be made and done in pursuance of this Act, except only the affidavits to be filed, may together with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such Rule or Order; and every such Rule or Order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments; and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by *fiery facias* or *capias ad satisfaciendum*, adapted to the case, together with the costs of such entry, and of the execution if by *fiery facias*; and such writ or writs may bear *teste* on the day of issuing the same, whether in term or vacation; and the sheriff or other officer executing any such writ shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the Court. VIII. And whereas by a certain Act made and passed in the last Session of Parliament intituled *An Act to improve the Proceedings in Prohibition and on Writs of Mandamus*, it was among other things enacted, that it should be lawful for the Court to which application may be made for any such Writ of Mandamus as is therein in that behalf mentioned to make Rules and Orders calling not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to show cause against the issuing of such writ and payment of the costs of the application, and upon the appearance of such other person in compliance with such Rules, or, in default of appearance, after service thereof, to exercise all such powers and authorities, and make all such Rules and Orders applicable to the case, as were or might be given or mentioned by or in any Act passed or to be passed during that present Session of Parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims; and whereas no such Act was passed during the then present Session of Parliament; Be it therefore enacted, that upon any such application as is in the said Act and hereinbefore mentioned, it shall be lawful for the Court to exercise all such powers and authorities, and make all such Rules and Orders applicable to the case, as are given or mentioned by or in this present Act."

The Common Law Procedure Act, 1860,* (23 & 24 Vict., c. 126), con-

* This Act is, curiously enough, called "Interpleader Act" in the present Rules.

tains the following provisions respecting "Interpleader Proceedings," in ss. 12 to 18:—

"XII. Where an action has been commenced in respect of a Common Law claim for the recovery of money or goods, or where goods or chattels have been taken or are intended to be taken in execution under process issued from any one of the Superior Courts, or from the Court of Common Pleas at Lancaster or the Court of Pleas at Durham, and the Defendant in such action, or the Sheriff or other officer, has applied for relief under the provisions of an Act made and passed in the Session of Parliament held in the first and second year of the reign of His late Majesty King William the Fourth, intituled *An Act to enable Courts of Law to give Relief against adverse Claims made upon Persons having no Interest in the Subject of such Claims*, it shall be lawful for the Court or a Judge to whom such application is made to exercise all the powers and authorities given to them by this Act and the hereinbefore mentioned Act passed in the Session of Parliament held in the first and second years of the reign of His late Majesty King William the Fourth, though the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another. XIII. When goods or chattels have been seized in execution by a Sheriff or other officer under process of the above-mentioned Courts, and some third person claims to be entitled under a bill of sale or otherwise to such goods or chattels, by way of security for a debt, the Court or a Judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt, or otherwise, as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such Court or Judge may seem just. XIV. Upon the hearing of any Rule or Order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the Court or Judge, wherever, from the smallness of the amount in dispute or of the value of the goods seized, it shall appear to them or him desirable and right so to do, at the request of either party, to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner, upon such terms as they or he shall think fit to impose, and to make such other Rules and Orders therein as to costs and all other matters as may be just. XV. In all cases of Interpleader proceedings, where the question is one of law, and the facts are not in dispute, the Judge shall be at liberty, at his discretion, to decide the question without directing an action or issue, and, if he shall think it desirable, to order that a Special Case be stated for the opinion of the Court. XVI. The proceedings upon such case shall, as nearly as may be, be the same as upon a Special Case stated under "The Common Law Procedure Act, 1852," and Error may be brought upon a judgment upon such case; and the provisions of "The Common Law Procedure Act, 1854," as to bringing Error upon a Special Case, shall apply to the Proceedings in Error upon a Special Case under this Act. XVII. The judgment in any such action or issue as may be directed by the Court or Judge in any Interpleader proceedings, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them. XVIII. All Rules, Orders, matters, and decisions to be made and done in Interpleader proceedings under this Act (excepting only any affidavits) may, together with the declaration in the cause, if any be entered on Record, with a note

in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce payment of costs directed by any such Rule or Order; and every such Rule or Order so entered shall have the force and effect of a judgment in the Superior Courts of Common Law.

Rule 3.

All other proceedings in and applications to the High Court may, subject to these Rules, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if the Act had not been passed.

See section 21, *supra*, which this Rule follows.

ORDER II.

WRIT OF SUMMONS AND PROCEDURE, &c.

Rule 1.

Every action in the High Court shall be commenced by a writ of summons, which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which shall specify the Division of the High Court to which it is intended that the action should be assigned.

This Rule is a re-enactment of Rule 2 of the Principal Act, which is founded on section 2 of the C.P. Act, 1852. See Order III., Rule 2, as to the indorsement required by this Rule. Forms of such indorsements will be found in Part II. of Appendix (A).

The writ of summons also contains a vacant space for the letter and number of the action, pursuant to Order V., Rule 8. In other particulars it follows sections 2—6 of the Common Law Procedure Act, 1852, except as to *teste* (see Rule 8).

By Order V., Rule 5, the writ of summons must be printed on the paper, in the type and with the margin specified by Order LVI., Rule 2.

The commencement of an action in the Chancery Division by a writ of summons is a great departure from the former practice in suits in the Court of Chancery. The first step in the institution of a suit in the Court of Chancery has since the 1st of November, 1852, been to prepare the Bill of Complaint, and deliver it to the Clerk of Records and Writs, who thereupon filed it, by writing on it the date and a number, and then, and not till then, did the plaintiff proceed to bring the defendants before the Court,

by serving them, and this not by serving them with a writ, but with a printed copy of the Bill.

This Rule must be taken to completely repeal section 3 of the Chancery Amendment Act, 1852 :—

“The defendant shall be served with a printed Bill of Complaint, with an indorsement thereon, in the form or to the effect set out in the Schedule to this Act, with such variations as circumstances may require.”*

Rule 2.

Any costs occasioned by the use of any more prolix or other forms of writs, and of indorsements thereon, than the forms hereinafter prescribed, shall be borne by the party using the same, unless the Court shall otherwise direct.

This Rule is a re-enactment of Rule 3 of the Principal Act, with the omission of the initial words, “Forms of writs and of indorsements thereon, applicable to the several ordinary causes of action, shall be prescribed by the Rules of Court,” and the addition of the words, “than the forms hereinafter described,” so as to adapt the Rule to the present Act.

Rule 3.

The writ of summons for the commencement of an action shall, except in the cases in which any different form is hereinafter provided, be in Form No. 1 in Part I. of Appendix (A.), hereto, with such variations as circumstances may require.

This is Rule 1 of Order I. of the Rule of Court drawn up in 1874 under the Principal Act.

Compare the 2nd Section of the Common Law Procedure Act, 1852.

* The form in the Schedule runs thus:—

“VICTORIA R.

“To the within-named Defendant *C. D.*, greeting.

“We command you [‘and every of you’ *where there is more than One Defendant*], That within Eight Days after Service hereof on you, exclusive of the Day of such Service, you cause an appearance to be entered for you in our High Court of Chancery to the within Bill of Complaint of the within-named *A. B.*, and that you observe what our said Court shall direct. Witness Ourselves at Westminster, the
Day of _____ in the _____ Year of Our
Reign,

“Note.—If you fail to comply with the above Directions you will be liable to be arrested and imprisoned.

“Appearances are to be entered at the Record and Writ Clerks’ Office, Chancery Lane, London.”

The words, "with such variations as circumstances may require," appear to have been introduced with a view to relaxing the stringency of the rule that the writ of summons must be in the prescribed form.* The form of writ is copied from No. 1 of Schedule (A) of the Common Law Procedure Act, 1852, with the necessary alterations to adapt it to the Principal Act and this Act, the more remarkable being (1) the addition of a notice to the defendant that he may appear by entering an appearance either personally or by solicitor at [blank] office, at [blank place]; and (2) the indorsement of the plaintiff's claim (see as to the latter, the forms in Part II., sections 2, 4, &c., of Appendix A.)

Rule 4.

No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of a Court or Judge.

This is Rule 2 of Order 1 of the Rules of Court drawn up in 1874 under the Principal Act. The sections of the Common Law Procedure Act, 1852, dealing with the question of writs for service out of the jurisdiction, or where notice is to be given out of the jurisdiction, are the 18th and 19th, which see. "Leave of a Court or a Judge" was not, under the former practice, a condition precedent to the issue of the writ. It will be seen from a reference to the form of the writ—Appendix A, Part II., Form No. 2—that the number of days, to be specified in the body of the writ, for entering an appearance, is not left as formerly to the plaintiff to select, but is to be filled up "as directed by the Court or a Judge ordering the service or notice." It certainly seems more fair to the defendant that the Court or a Judge should fix the time than the plaintiff. The time will, no doubt, as hitherto, be "regulated by the distance from England of the place where the defendant is residing."†

The leave of the Court or a Judge being a condition precedent to the issuing of the writ, it is apprehended that the Court or Judge must be satisfied that there is a cause of action which arose within the jurisdiction *before* granting such leave. Hitherto the Court or Judge did not require to be satisfied that there was such cause of action until *after* the writ had been served, and then it might turn out that the plaintiff had taken all his trouble in serving the defendant fruitlessly, for it has been expressly decided, in *Binet v. Picot*,‡ that when it appears that the cause of action did not arise within the jurisdiction, the Court will set aside the writ and service.

Rule 5.

A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the

* See Day's Common Law Procedure Acts, p. 30.

† 15 & 16 Vict., c. 76, s. 18.

‡ 4 H. and N., 365; L. J., 28 Ex., 244.

jurisdiction, shall be in Form No. 2 in Part I. of Appendix (A.) hereto, with such variations as circumstances may require. Such notice shall be in Form No. 3 in the same part, with such variations as circumstances may require.

This is Rule 3 of Order I of the Rules of Court drawn up in 1874 under the Principal Act, "Appendix (A)" being substituted for "Schedule (A)" in order to adapt the Rule to the present Act. The forms of the writ and notice of writ in lieu of service are copied from Nos. 2 and 3 of Schedule (A) to the Common Law Procedure Act, 1852. From a reference to the form, No. 2, it is evident that the former practice, which requires service of a copy of the writ in the case of a British subject residing out of the jurisdiction, and service of notice of the writ in the case of a foreigner resident out of the jurisdiction (see ss. 18 and 19 of the Common Law Procedure Act, 1852), is to be continued.

The indorsements on the writ are to be "copied in full" into the form of notice of the writ, No. 3.

Rule 6.

With respect to actions upon a bill of exchange or promissory note, commenced within six months after the same shall have become due and payable, the procedure under the Bills of Exchange Act, 18 & 19 Vict. c. 67, shall continue to be used.

This is Rule 4 of Order I of the Rules of Court drawn up in 1874 under the Principal Act.

The Summary Procedure on Bills of Exchange Act, 1855, (18 and 19 Vict. c. 67) is as follows:—

"Whereas *bonâ fide* holders of dishonoured bills of exchange and promissory notes are often unjustly delayed and put to unnecessary expense in recovering the amount thereof by reason of frivolous or fictitious defences to actions thereon, and it is expedient that greater facilities than now exist should be given for the recovery of money due on such bills and notes: Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by authority of the same, as follows:

"I. From and after the twenty-fourth day of October, one thousand eight hundred and fifty-five, all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable may be by writ of summons in the special form contained in Schedule A. to this Act annexed, and endorsed as therein mentioned; and it shall be lawful for the plaintiff, on filing an affidavit of personal service of such writ within the jurisdiction of the Court, or an order for leave to proceed as provided by the Common Law Procedure Act, 1852, and a copy of the writ of summons and the

indorsement thereon, in case the defendant shall not have obtained leave to appear and have appeared to such writ according to the exigency thereof, at once to sign final judgment in the form contained in schedule B. to this Act annexed (on which judgment no proceeding in error shall lie) for any sum not exceeding the sum indorsed on the writ, together with interest, at the rate specified (if any) to the date of the judgment, and a sum for costs to be fixed by the Masters of the Superior Courts or any three of them, subject to the approval of the Judges thereof or any eight of them (of whom the Lord Chief Justices and the Lord Chief Baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way, and the plaintiff may upon such judgment issue execution forthwith. II. A Judge of any of the said Courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ, and to defend the action, on the defendant paying into Court the sum indorsed on the writ, or upon affidavits satisfactory to the Judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the Judge may seem fit. III. After judgment, the Court or a Judge may, under special circumstances, set aside the judgment, and, if necessary, stay or set aside execution, and may give leave to appear to the writ, and to defend the action, if it shall appear to be reasonable to the Court or Judge so to do, and on such terms as to the Court or Judge may seem just. IV. In any proceedings under this Act it shall be competent to the Court or a Judge to order the bill or note sought to be proceeded upon to be forthwith deposited with an officer of the Court, and further to order that all proceedings shall be stayed until the plaintiff shall have given security for the costs thereof. V. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment or otherwise, by reason of such dishonour, as he has under this Act for the recovery of the amount of such bill or note. VI. The holder of any bill of exchange or promissory note may, if he think fit, issue one writ of summons, according to this Act, against all or any number of the parties to such bill or note, and such writ of summons shall be the commencement of an action or actions against the parties therein named respectively, and all subsequent proceedings against such respective parties shall in like manner, so far as may be, as if separate writs of summons had been issued. VII. The provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and all rules made under or by virtue of either of the said Acts, shall, so far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under this Act. VIII. The provisions of this Act shall apply, as near as may be, to the Court of Common Pleas at Lancaster and the Court of Pleas at Durham, and the Judges of such Courts, being Judges of one of the Superior Courts of Common Law at Westminster, shall have power to frame all rules and process necessary thereto. IX. It shall be lawful for Her Majesty from time to time, by an order in Council, to direct that all or any part of the provisions of this Act shall apply to all or any Court or Courts of Record in England and Wales, and within one month after such order shall have been made and published in the "London Gazette" such provisions shall extend and apply in manner

directed by such order, and any such order may be, in like manner, from time to time altered and annulled; and in and by any such order Her Majesty may direct by whom any powers or duties incident to the provisions applied under this Act shall and may be exercised with respect to matters in such Court or Courts, and may make any orders or regulations which may be deemed requisite for carrying into operation in such Court or Courts the provisions so applied. X. Nothing in this Act shall extend to Ireland or Scotland. XI. In citing this Act in any instrument, document, or proceedings, it shall be sufficient to use the expression 'The Summary Procedure on Bills of Exchange Act, 1855.' "

"Schedules referred to in the foregoing Act.

"A

"Victoria; by the grace of God, &c.

"To *C. D.*, of _____, in the county of _____
We warn you, that unless within twelve days after the service of this writ on you, inclusive of the day of such service, you obtain leave from one of the Judges of the Courts at Westminster to appear, and do within that time appear in our Court of _____ in an action at the suit of *A.B.*, the said *A.B.* may proceed to judgment and execution.

"Witness, &c.

"*Memorandum to be subscribed on the writ.*

"N.B.—This writ is to be served within six calendar months from the date thereof, or if renewed, from the date of such renewal, including the day of such date, and not afterwards.

"*Indorsement to be made on the writ before service thereof.*

"This writ was issued by *E.F.*, of _____, attorney for the plaintiff. Or, This writ was issued in person by *A.B.*, who resides at [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence.]

"*Indorsement.*

"The plaintiff claims [_____ pounds principal and interest], or _____ pounds balance of principal and interest due to him as the payee [or indorsee] of a bill of exchange or promissory note, of which the following is a copy:—

[Here copy bill of exchange or promissory note, and all indorsements upon it.]

And if the amount thereof be paid to the plaintiff or his attorney within _____ days from the service hereof, further proceedings will be stayed.

"*Notice.*

"Take notice, that if the defendant do not obtain leave from one of the Judges of the Courts within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do not within such time cause an appearance to be entered for him in the Court out of which this writ issues, the plaintiff will be at liberty at any time after the expiration of such twelve days to sign final judgment for any sum not exceeding the sum above claimed, and the sum of _____ pounds for costs, and issue execution for the same.

"Leave to appear may be obtained on an application at the Judges

Chambers, Serjeants' Inn, London, supported by affidavit showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.

"Indorsement to be made on the writ after service thereof.

"This writ was served by X. Y. on L. M. (the defendant the defendants), on Monday the day of 18 :
"By X. Y.

"B.

"In the Queen's Bench.

"On the day of in the year of our Lord 18
[Day of signing judgment.]

"England (to wit). A. B. in his own person [or by his attorney] sued out a writ against C. D., indorsed as follows:—

"[Here copy indorsement of plaintiff's claim.]
and the said C. D. has not appeared:

"Therefore it is considered that the said A. B. recover against the said C. D. pounds, together with pounds for costs of suit."

Rule 7.

The writ of summons in every Admiralty action *in rem* shall be in Form No. 4 of Part I. of Schedule (A) hereto, with such variations as circumstances may require.

This is Rule 6 of Order I. of the Rules of Court drawn up in 1874 under the Principal Act, "Appendix (A)" being substituted for "Schedule (A)" in order to adapt the Rule to the present Act. The form No. 4 of Part I. of Appendix (A) is substituted for the warrant to arrest the ships and [or] cargo under the old practice, for a copy of which see Williams and Bruce's "Admiralty Practice," Appendix, p. XLIX.

The writ of summons under this Rule is addressed "to the men and "parties interested in the ships" (or "cargo," as the case may be). The warrant was addressed to the Marshal of the High Court of Admiralty and his substitutes; oddly enough the new writ contains no reference to the cause except in the title. The writ authorizes, instead of commanding, the arrest. The command is addressed to the men and parties interested to appear within eight days. The warrant commanded the Marshal and his substitutes to cite all persons having or claiming to have any right, title, or interest to appear within six days.

An action *in personam* in the Court of Admiralty was commenced by a citation *in personam*, addressed to the defendant, and somewhat resembling in its contents an ordinary writ of summons in the Supreme Court of Common Law; instead of being tested by a Judge, it was signed by the Registrar. As no mention is made of the citation *in personam* in these Rules it must be assumed that it is abolished, and the form of writ applicable to the other Divisions are applicable to it. The same observation applies to the form of citation in the Probate Court, which must be taken to be superseded by the forms mentioned in Rules 3 and 5.

Rule 8.

Every writ of summons, and also every other writ, shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chancellor, or, if the office of Lord Chancellor shall be vacant, in the name of the Lord Chief Justice of England.

This is Rule 7 of Order I of the Rules of Court drawn up in 1874 under the Principal Act. This Rule repeals s. 5 of the Common Law Procedure Act, 1852, which provides that "Every writ of summons shall be tested in the name of the Lord Chief Justice and Lord Chief Baron of the Court from which the same shall issue, or in case of a vacancy of such office, then in the name of a senior Judge of the said Courts."

See p. 480 and Appendix.

ORDER III.

INDORSEMENTS OF CLAIM.

Rule 1.

The indorsement of claim shall be made on every writ of summons before it is issued.

This is Rule 1 and Order II of the Rules of Court drawn up in 1874 under the Principal Act.

The indorsement of a claim on the writ of summons *in every case* is one of the peculiar features of the system of procedure introduced by the Judicature Acts. By section 8 of the Common Law Procedure Act, 1852, it is provided that "upon the writ and copy of any writ served *for the payment of any debt*, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for costs." It has been expressly decided* that if a plaintiff claims both a debt and damages—a *fortiori*, if he claims damages only—he need not indorse the amount of his claim on the writ. The claim must now in *all* cases be indorsed. On a reference to the forms headed "damages and other claims" in Appendix (A), Part II., section 4, it will be seen that the *amount* of the claim is not to be indorsed where the claim is for damages, and not for a debt. The expression used is, "The plaintiff's claim is for damages," without stating the amount. The difficulty which arose in cases of actions for breaches of conditions in bonds, as to fixing the precise amount of the claim, regarded as in the nature of a debt,† cannot arise under the new system, as the *amount* of the claim is left perfectly open, while the *nature* of the claim is stated.

* *Perry v. Patchett*, 2 Dowl. 667. This was an action for the value of a stack of hay, and also for damages over for the illegal distraint of it.

† See *Rowland v. Dakeyne*, 2 Dowl. 832; *Smart v. Lovett*, 3 Dowl. 34.

Rule 2.

In the indorsement required by Order II., Rule 1, it shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled. The plaintiff may by leave of the Court or Judge amend such indorsement so as to extend it to any other cause of action, or any additional remedy or relief.

This is Rule 2 of Order II. of the Rules drawn up in 1874 under the Principal Act, "Order II., Rule 1," being substituted for "Rule 2 of the Schedule to the Act," to adapt the Rule to the present Act.

The forms in Appendix (A), Part II., do set out, though not very concisely, "the precise remedy or relief to which the plaintiff considers himself entitled."

The concluding sentence of this Rule accords with s. 20 of the Common Law Procedure Act:—"Any writ may be amended upon application to be made to the Court or to a Judge." The amendment sanctioned by this Rule may, however, extend the indorsement to any other cause of action or any additional remedy or relief. Amendments under s. 20 of the Common Law Procedure Act, 1852, only applied to such small matters as altering the date* to make it correspond with the *præcipe*, or putting in the Christian names of defendants.† It is questionable whether the Court or a Judge would now entertain an application to "set aside the writ as irregular," under s. 20 of the Common Law Procedure Act, 1852.

Rule 3.

The indorsement of claim may be to the effect of such of the Forms in Part II. of Appendix (A) hereto as shall be applicable to the case, or if none be found applicable, then such other similarly concise form as the nature of the case may require.

This is Rule 3 of Order II. of the Rules of Court drawn up in 1874 under the Principal Act, "Appendix (A)" being substituted for "Schedule (A)" in order to adapt the Rule to the present Act.

It will be seen that there are forms suitable for actions in the Chancery,‡ Probate,§ Admiralty|| and Common Law¶ Divisions of the High Court.

* *Kirk v. Dolby*, 6 M. & W. 636.

† *Rutherford v. Mein*, 2 Smith, 392.

‡ Section 1. § Section 5. || Section 6. ¶ Sections 2, 4 and 7.

Rule 4.

If the plaintiff sues, or the defendant or any of the defendants is sued in a representative capacity, the indorsement shall show, in manner appearing by the statement in Appendix (A) hereto, Part II., sec 8, or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued.

This is Rule 4 of Order II. of the Rules of Court drawn up in 1874 under the Principal Act, "Appendix (A)" being substituted for "Schedule (A)" in order to adapt the Rule to the present Act.

It will be perceived that in these forms referred to the word "as" is used before the particular word expressing the "capacity" in which the party sues or is sued. It has been decided that if a plaintiff describes himself thus, "A B executor," he may declare for a cause of action accruing to him in his own right, but that if he describe himself, "A B *as* executor of C D," he can only declare for a cause of action accruing to him in that character.* It is apprehended that the present rule will prevent a plaintiff from issuing a writ as if for a cause of action accruing to himself in his own right and then declaring *in auter droit*, a mode of proceeding which has hitherto been perfectly legal, though hardly fair to defendants.† Defendants have also a right to know in what capacity they themselves are sued.

Rule 5.

In Probate actions the indorsements shall show whether the plaintiff claims as creditor, executor, administrator, residuary legatee, legatee, next of kin, heir-at-law, devisee, or in any and what other character.

This is Rule 5 of Order II., of the Rules of Court drawn up in 1874 under the Principal Act.

Rule 6.

In all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange,

* *Anon., Executors, v. Anon.*, 1 Dowl. 97.

† See note to case last cited, and 2 Str. 1232 n (1), *Ashworth v. Ryall*, 1 B & Adol. 19 (misquoted "Ald." 1 Dowl. 98).

promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, or on a trust, the writ of summons may be specially indorsed with the particulars of the amount sought to be recovered, after giving credit for any payment or set-off.

This Rule is a re-enactment of Rule 7, of the Principal Act, which is copied from s. 25 of the Common Law Procedure Act, 1852. Forms of special indorsements under this Rule will be found in Appendix (A), Part II., section 7, *infra*.

See Order XIII., Rules 3 and 4, as to signing final judgment in case of non-appearance, when the writ is specially indorsed under this section.

As to calling on the defendant to show cause why the plaintiff should not be at liberty to sign final judgment, when the defendant appears on a writ specially indorsed under this Rule, see Order XIV., Rule 1, *infra*. As to the short form of statement of claim, when the writ is specially indorsed, see Order XXI., Rule 4, *infra*, and Appendix (B), Form No. 3.

The adoption of the principle of the 25th section of the Common Law Procedure Act was recommended by the Judicature Commission:—

“In all cases in which the plaintiff seeks to recover a money demand, when founded upon a legal or equitable right, the practice established by the Common Law Procedure Act, 1852, should, we think, be adopted, and the writ should be specially indorsed with the amount sought to be recovered, and in default of appearance the plaintiff should be allowed to sign judgment for it”—(as to which see Order XIII., Rule 3).—“Further, in all cases in which a special indorsement has been made on a writ, and the defendant has appeared, the plaintiff should be entitled, on affidavit verifying the cause of action and swearing that in his belief there is no defence, to take out a summons to show cause why he should not be at liberty to sign judgment, upon which summons such order may be made as the justice of the case may require” (as to which see Order XIV.).

Rule 7.

Wherever the plaintiff's claim is for a debt or liquidated demand only, the indorsement, beside stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs respectively, and shall further state, that upon payment

thereof within four days after service, or, in case of a writ not for service within the jurisdiction, within the time allowed for appearance, further proceedings will be stayed. Such statement may be in the form in Appendix (A) hereto, Part II., sec. 3. The defendant may, notwithstanding such payment, have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor shall pay the costs of taxation.

This is Rule 6 of Order II., of the Rules of Court up drawn in 1874 under the Principal Act, "Appendix A" being substituted for "Schedule A," to adapt the Rule to the present Act.

This Rule is copied almost *verbatim* from s. 8 of the Common Law Procedure Act, 1852, where the form also is given.

Although the nature of the plaintiff's claim is, by Rule 1, to be indorsed upon the writ in all cases, whether it be for debt or damages, yet the old practice with respect to stay of proceedings upon payment within four days is preserved, in the case of a claim for a debt only. The check upon overcharging under the old practice has also been preserved.*

Rule 8.

In all cases of ordinary account, as, for instance, in the case of a partnership or executorship or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be indorsed with a claim that such account be taken.

This Rule is a re-enactment of the first part of Rule 8 of the Principal Act.

See Order XV., as to making an order for the account claimed in default of appearance to a summons indorsed under this Rule.

This Rule is copied almost *verbatim* from the First Report of the Judicature Commission :—†

"In like manner, in cases of ordinary account, or in the case of a partnership or executorship or ordinary trust account, when nothing more is required in the first instance than an account, the writ should be specially indorsed."

* It should be noted that, although this Rule speaks of "a debt or liquidated demand," the same phrase as used in the preceding Rule, it has no reference to "special" indorsements.

† P. 11.

ORDER IV.

INDORSEMENT OF ADDRESS.

Rule 1.

The solicitor of a plaintiff suing by a solicitor shall indorse upon every writ of summons and notice in lieu of service of a writ of summons the address of the plaintiff, and also his own name or firm and place of business, and also, if his place of business shall be more than three miles from Temple Bar, another proper place, to be called his "address for service," which shall not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings and written communications, may be left for him. And where any such solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor.

This is Rule 1 of Order III. of the Rules of Court drawn up in 1874 under the Principal Act.

It is somewhat singular that Temple Bar should have been selected as the centre, that edifice being doomed to removal or destruction. Its proximity to the Masters' and the Records and Writ Clerks' Offices is probably the reason for the selection.

Compare with this Rule section 6 of the Common Law Procedure Act, 1852, for the early part of which it is, *pro tanto*, substituted—"Every writ of summons shall be indorsed with the name and place of abode of the attorney actually suing out the same, and in case such attorney shall not be an attorney of the Court, in which the same is sued out, then also with the name and place of abode of the attorney of such Court in whose name such writ shall be taken out; and when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the writ."

One of the effects of the consolidation of the Superior Courts of Common Law and Equity into one Supreme Court is the admission of attorneys and solicitors to be solicitors of the Supreme Court, in lieu of being admitted attorneys or solicitors of any one or more of the Superior Courts. Therefore the contingency contemplated in section 6 of the Common Law Procedure Act, 1852, of "the attorney actually suing out the writ" not being "an attorney of the Court in which it is sued out" cannot arise. No provision, therefore, is made in this Rule for any such contingency.

* 2 Dowl. 145; *Hartley v. Rodenhurst*, 4 Dowl. 748.

It was decided in *Engleheart v. Eyre* that where the writ is sued out by a firm of attorneys the name of the firm should be indorsed. The present Rule provides expressly for the indorsement of the name of the firm (if any), both of the solicitor suing out the writ, and also of the solicitor (if any) for whom he is agent.

It is also provided that "*the solicitor suing out the writ shall indorse upon it 'the address of the plaintiff.'*" This is new, and a decided improvement, a defendant being entitled to full information as to the person to whom he may address himself for a settlement of the action against him.* A reference to the form of writ given in Schedule (A) to the Common Law Procedure Act, No. 1, will show that no space is left for the address of the plaintiff where the plaintiff appears by attorney. In the form given in Appendix (A) Part 1, No. 1, *infra*, the words "who resides at" are inserted after the word "plaintiff" when the plaintiff appears by attorney, and a blank is left for the plaintiff's address after the word "at."

It will seem that the solicitor is to indorse his own "place of business" on his writ. This is an improvement on "place of abode," which might mean his private residence.†

The provisions respecting an "address for service" are founded on Reg. Gen., Hil. T., 1853, Rule 165, but it is a new provision that the address the service shall be indorsed upon the writ. It was formerly written in a book kept at the Master's office, but the copy of the writ filed there in future will contain it.‡

It will be perceived that nothing is said about the address of the defendant. It is apprehended that the provisions of section 2 of the Common Law Procedure Act, 1852, still apply. A reference to the form in Appendix (A), Part 1, No. 1, *infra*, will show that the same words as occur in the form given in Schedule (A) to the Common Law Procedure Act, No. 1, are used, in respect of the defendant's address:—

"To C. D. of () in the county of ()"

Rule 2.

A plaintiff suing in person shall indorse upon every writ of summons and notice in lieu of service of a writ of summons his place of residence and occupation, and also, if his place of residence shall be more than three miles from Temple Bar, another proper place, to be called his "address for service," which shall not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him.

[The above two rules are to apply to all cases in which

* Day's Common Law Procedure Acts, 32, 33, 4th ed. (1872.)

† See the decisions as to the meaning of the words "place of abode," "residence," and "dwelling," collected in *Attenborough v. Thompson*, 2 H. and N., 559, and in *Kerr v. Haynes*, L. J. 29, C. B. 44.

‡ See Notanda.

the writ of summons is issued out of the London office, or out of a District Registry where the defendant has the option of entering an appearance either in the District Registry or the London office.]

This Rule and the note are identical with Rule 2 of Order III. of the Rules of Court drawn up in 1874 under the Principal Act, and the note thereto.

Compare with this Rule s. 6 of the Common Law Procedure Act, 1852, for the latter part of which it is, *pro tanto*, substituted. "In case no attorney shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff in person, mentioning the city, town, parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be."

"His place of residence." A reference to the form No. 1 in Appendix (A) Part 1, will show that the "city, town, or parish, and also the name of the street, and number of the house of the plaintiff's residence (if any)" must be specifically mentioned.

The provision respecting an "address for service" is founded on Reg. Gen., Hil. T., 1853, and Rule 166, but it is a new provision that the "address for service" shall be indorsed on the writ. Formerly it was written in a book kept at the Master's office. (See note to Rule 1.)

Rule 3.

In all other cases where a writ of summons is issued out of a District Registry it shall be sufficient for the solicitor to give on the writ the address of the plaintiff and his own name or firm and his place of business within the district, or for the plaintiff, if he sues in person, to give on the writ his place of residence and occupation, and if his place of residence be not within the district, an address for service within the district.

This is Rule 3 of Order III. of the Rules of Court drawn up in 1874 under the Principal Act.

ORDER V.

ISSUE OF WRITS OF SUMMONS.

1. *Place of Issue.*

Rule 1.

In any action other than a Probate action, the plaintiff

wherever resident, may issue a writ of summons out of the Registry of any district.

This is Rule 1 of Order IV. of the Rules of Court drawn up in 1874 under the Principal Act.

By s. 64 of the Principal Act, writs of summons for the commencement of actions in the High Court of Justice shall be issued by the District Registrars, when thereunto required.

As to the removal of the action by the defendant as of right see Order XXXV., Rules 11-14.

Rule 2.

In all cases where a defendant neither resides nor carries on business within the district out of the Registry whereof a writ of summons is issued, there shall be a statement on the face of the writ of summons that such defendant may cause an appearance to be entered at his option either at the District Registry or the London office, or a statement to the like effect.

This is Rule 2 of Order IV. of the Rules of Court drawn up in 1874 under the Principal Act.

This provision is based on the wholesome policy of affording the defendant full information. See Order XII., Rule 2, as to the case when the defendant resides or carries on his business within the District Registry.

Rule 3.

In all cases where a defendant resides or carries on business within the district, and a writ of summons is issued out of the District Registry, there shall be a statement on the face of the writ of summons that the defendant do cause an appearance to be entered at the District Registry, or to the like effect.

This is Rule 3 of Order IV. of the Rules of Court drawn up in 1874 under the Principal Act.

This does not preclude the defendant from removing the action, as of right, at any time after appearance, under Rule 11 of the XXXVth Order.

2. Option to choose division in certain cases.

Rule 4.

Subject to the power of transfer, every person by

whom any cause or matter may be commenced in the High Court of Justice which would have been within the non-exclusive cognizance of the High Court of Admiralty if the said Act had not passed shall assign such cause or matter to any one of the Divisions of the said High Court, including the Probate, Divorce, and Admiralty Division, as he may think fit, by marking the document by which the same is commenced with the name of the Division, and giving notice thereof to the proper officer of the Court. If so marked, for the Chancery Division, the same shall be assigned to one of the Judges of such Division by marking the same with the name of such of the said Judges as the plaintiff or petitioner (subject to such power of transfer) may think fit.

This is Rule 4 of Order IV. of the Rules of Court drawn up in 1874 under the Principal Act.

See Rule 9 of the present Order, *infra*, as to the manner in which notice to the proper officer of the Court is to be given.

"The power of transfer." See section 36 of the Principal Act, Order LI., Rules 1 and 2.

By section 11, sub-section (3), *supra*, it is provided, that, "subject to Rules of Court, a person commencing any cause or matter shall not assign the same to the Probate Divorce, and Admiralty Division unless he could have been entitled to commence the same in the Court of Probate or in the Court for Divorce and Matrimonial causes, or in the High Court of Admiralty, if this Act had not passed." "Which would have been within the non-exclusive cognizance" is, it is apprehended, a crabbed phrase for "which would not have been within the exclusive cognizance."

Section 11, *supra*, says, "subject to Rules of Court." Causes common to the Court of Admiralty and other Courts may be assigned to either by this Rule. See, as to the exclusive jurisdiction, s. 34, clause 5 (2) of the Principal Act.

"Name of the Judge." See the Forms 2, 3, and 4 in the Appendix (C). It will be seen that a space is left for the name of the Judge, thus, "In the High Court of Justice, Chancery Division [name of Judge]." Suits in Chancery have hitherto been held before a single Judge. See p. 94 and section 42 of the Principal Act.

3. Generally.

Rule 5.

Writs of summons shall be prepared by the plaintiff or his solicitor, and shall be written or printed, or partly

written and partly printed, on paper of the same description as hereby directed in the case of proceedings directed to be printed.

This is Rule 5 of Order IV. of the Rules of Court drawn up in 1874, under the Principal Act.

"The writ," observes Mr. Day,* "is *issued* by the Court, but it is *prepared* by the plaintiff or his attorney."

"Paper of the same description:" *i.e.* "cream wove machine drawing fools-cap folio paper, 19 lbs. per mill ream, or thereabouts." Order LVI., Rule 2. (See note to that enactment.) This involves the abolition of parchment writs. The practice is borrowed from the Court of Chancery. By the Chancery Amendment Act, 1852, it was provided, that "the practice of engrossing on parchment Bills of Complaint or Claims to be filed in the Court, or of filing such engrossment, shall be discontinued; and the Clerks of Records and Writs of the said Court shall receive and file a printed Bill of Complaint or Claim, in lieu of an engrossment thereof, in like manner as they now receive and file such engrossment."

Rule 2 of Order LVI. is copied from Order IX., Rule 3, of the Consolidated Orders of the Court of Chancery, as to printing.†

Rule 6.

Every writ of summons shall be sealed by the proper officer, and shall thereupon be deemed to be issued.

This is Rule 6 of Order IV. of the Rules of Court drawn up in 1874, under the Principal Act.

"The indorsements," says Mr. Day,‡ when stating the old Common Law practice, "being made on the writ, it must be sealed at the office of the Court from which it is issued."

By Order I. (VI.) 37 of the Consolidated Orders of the Court of Chancery, the Clerks of Records and Writs have the duty cast upon them of sealing writs. A writ when sealed by them has the same force and validity as such writ has when sealed with the Great Seal.§ Proceedings, however, have not for some years been commenced in Chancery by writ of subpoena or of summons, but by serving a copy of the Bill, and a writ of summons is not one of the writs to which the above Rule is applicable.

Rule 7.

The plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the officer a copy, written or printed, or partly written and partly printed,

* Common Law Procedure Acts, p. 31, 4th edn. (1872).

† See Morgan and Chute's Chancery Acts and Orders, p. 409; Daniel's Chancery Practice, p. 322; Forms to same, p. 195.

‡ Common Law Procedure Acts, *ubi supra*.

§ See Morgan and Chute's Chancery Acts, and Acts and Orders, 379, 380.

on paper of the description aforesaid, of such writ, and all the indorsements thereon, and such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person.

This is Rule 7 of Order IV. of the Rules of Court drawn up in 1874, under the Principal Act.

"Paper of the description aforesaid." See Rule 5, *supra*, and Order LVI., Rule 2.

No mention is made of a *præcipe* in this or the following Rules. By Order XLII, Rule 10, it is provided that "No writ of execution shall be issued without a *præcipe*."

The *præcipe* was left with the officer,* who filed it and entered full particulars of it in a book kept for the purpose.†

Instead of the *præcipe*, it seems that the plaintiff, or his solicitor, is to leave a copy of the writ, which is to be filed. (See the next section.)‡

The filing of a copy of a writ, and of "all the indorsements thereon," seems to be borrowed from the practice of the Court of Chancery of filing a copy of the Bill.§ It is provided by Order VIII, Rule 1, of the Consolidated Orders of the Court of Chancery that no Bill shall be filed unless it is signed by Counsel. A Bill does not require to be signed by the plaintiff or his attorney.||

It will be seen from the form of *præcipe*¶ that it was signed by the plaintiff's attorney, or by the plaintiff himself, if he sued in person.

The present Rules provide that the copy of the writ left, in lieu of the *præcipe*, shall be similarly signed.

It is to be observed that under the old Chancery Practice** it was necessary to take a *præcipe* to the Clerk of Records and Writs,†† and get it filed by him, at the time at which he sealed the writ of subpoena.

Rule 8.

The officer receiving such copy shall file the same, and an entry of the filing thereof shall be made in a book to be called the Cause Book, which is to be kept in the manner in which Cause Books have heretofore been kept by the Clerks of Records and Writs in the Court of Chancery,‡‡ and the action shall be distinguished by the

* See Archbold's Practice, p. 198.

† Archbold's Forms, p. 42, n. (a.)

‡ See Archbold, *ubi supra*.

§ See 15 & 16 Vict., c. 86, ss. 1, 4: Order VIII, Rule 3, and Order IX, Rule 4, of the Consolidated Orders of the Court of Chancery.

|| Ayckbourn's Chancery Practice, p. 12.

¶ Archbold's Practice, p. 42.

** See Ayckbourn's Chancery Practice, 5th edn., p. 30.

†† Or Clerk at the Subpoena Office.

‡‡ See "the manner in which Cause books are kept" in the Appendix.

date of the year, a letter, and a number, in the manner in which causes are now distinguished in such last-mentioned Cause Books.

This is Rule 8, Order IV., of the Rules of Court drawn up in 1874, under the Principal Act.

This Rule effects a considerable change in the practice of the Superior Courts of Common Law. Hitherto the commencement of the action has been noted up in one book in the defendant's name, and the appearance to the action in another, also in the defendant's name, in the simplest possible form. To the greater number of actions, no appearance is entered at all, the mere serving of the writ being sufficient to bring the defendant to terms. Out of 4,000 actions in one of the Superior Courts it is no uncommon thing for appearances to be entered only in 1,500. The "writ book" contains nothing but the names of the defendant, and of the plaintiff and his attorney. The appearance book contains only the names of the defendant, the plaintiff and of the defendant's attorney. The Common Law officers will be obliged in future to incorporate the appearance in the same book in which the commencement of the action is recorded.

The Clerks of Records and Writs in Chancery perform all such duties as were formerly performed by the six clerks, sworn clerks, and waiting clerks, as officers of the Court of Chancery.* Amongst their duties is the filing of all Bills, answers, and other pleadings, and the filing of appearances.†

All suits and proceedings in the Court of Chancery are divided amongst the Clerks of Records and Writs according to the letters of the plaintiff's or first plaintiff's surname and all subsequent proceedings, bills of review or supplement for example, are to be filed under the same name, although the plaintiff's or first plaintiff's surname in the subsequent proceedings may not be the same in the original suit.‡

Rule 9.

Notice to the proper officer of the assignment of an action to any Division of the Court under Section 11 of the Supreme Court of Judicature Act, 1875, or under Rule 4 of this Order shall be sufficiently given by leaving with him the copy of the writ of summons.

This is Rule 9 of Order IV., of the Rules of Court, drawn up in 1874, under the Principal Act, "section 11 of the Supreme Court of Judicature Act, 1875," being substituted for "section 35 of the Act of 1873," to adapt the Rule to the present Act.

4. In particular Actions.

Rule 10.

The issue of a writ of summons in Probate actions

* Consolidated General Orders of the Court of Chancery, Order 1, (VI) 55.

† Ibid.

‡ Veal's Practice, 6. See further Notanda.

shall be preceded by the filing of an affidavit made by the plaintiff or one of the plaintiffs in verification of the indorsement on the writ.

This is Rule 10 of Order IV., of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule is founded on Rule 68 of the Rules of 1862 of the Court of Probate:—"No citation is to issue under seal of the Court, until an affidavit in verification of the averments it contains has been filed in the Registry." This is called "an affidavit to lead the citation."

Rule 11.

In Admiralty actions *in rem* no writ of summons shall issue until an affidavit by the plaintiff or his agent has been filed, and the following provisions complied with :

(a.) The affidavit shall state the name and description of the party on whose behalf the action is instituted, the nature of the claim, the name and nature of the property to be arrested, and that the claim has not been satisfied.

(b.) In an action of wages the affidavit shall state the national character of the vessel proceeded against; and if against a foreign vessel, that notice of the institution of the action has been given to the Consul of the State to which the vessel belongs, if there be one resident in London [*a copy of the notice shall be annexed to the affidavit.*]

(c.) In an action of bottomry, the bottomry bond, and if in a foreign language also a notarial translation thereof, shall be produced for the inspection and perusal of the Registrar, and a copy of the bond, or of the translation thereof, certified to be correct, shall be annexed to the affidavit.

(d.) In an action of distribution of salvage the affidavit shall state the amount of salvage money awarded or agreed to be accepted, and the name, address, and description of the party holding the same.

(c.) The Court or Judge may in any case, if he think fit, allow the writ of summons to issue although the affidavit may not contain all the required particulars. In a wages cause he may also waive the service of the notice, and in case of bottomry the production of the bond.

This is Rule 11 of Order IV. of the Rules of Court drawn up, in 1874, under the Principal Act.

Subsection (a) is copied from Rule 9 of the Rules of the High Court of Admiralty, made in pursuance of the 3 and 4 Vict., cc. 65 and 66, and 17 and 18 Vict., c. 78. Subsection (b) is copied from Rule 10 of the same Rules, which, however, applies to "a cause of necessities," as well as a "cause of wages." The words in italics are part of the Rule in the original, being connected with it by the word "and."

Subsection (c) is copied *verbatim* from Rule 11 of the same Rules.

Subsection (e) is copied from Rule 13 of the same Rules, "the Court or Judge," being substituted for "the Registrar." The Rules in the original apply to a warrant to arrest the property proceeded against; in the present Rule they are made applicable to the writ of summons.

As to subsection (d), see the remarks in Williams and Bruce's Admiralty Practice, pp. 128, 1832 (Edn. 1869).

Rule 12.

If, when any property is under arrest in Admiralty, a second or subsequent action is instituted against the same property, the solicitor in such second action may, subject to the preceding rules, take out a writ of summons *in rem* and cause a caveat against the release of the property to be entered in the Caveat Release Book hereinafter mentioned.

This is Rule 12 of Order IV. of the Rules of Court, drawn up, in 1874, under the Principal Act.

Any person may commence a second or subsequent suit to enforce any claim he may have against the property proceeded against in an action *in rem* in the Court of Admiralty. He may, until his rights can be adjudicated upon, prevent the release of the property under arrest. The practice hitherto is laid down in Rule 53 of the Rules of the Court of Admiralty:—"A proctor in a cause, desiring to prevent the release of any property under arrest, shall file in the Registry a *præcipe*, and thereupon a caveat against the release of the property shall be entered in a book, to be called the "Caveat Release Book." The taking out of a writ of summons appears to be substituted for filing a *præcipe* in the Registry.

ORDER VI.

CONCURRENT WRITS.

Rule 1.

The plaintiff in any action may, at the time of or at any time during twelve months after the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear *teste* of the same day as the original writ, and to be marked with a seal bearing the word "concurrent," and the date of issuing the concurrent writ; and such seal shall be impressed upon the writ by the proper officer: Provided always, that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force.

This is Rule 1 of Order V. of the Rules of Court, drawn up, in 1874, under the Principal Act.

This Rule is copied *verbatim* from section 9 of the Common Law Procedure Act, 1852.

The form of the writ and indorsements will be the same as that of the original writ and indorsements, except that the officer must be required to seal the writ with a seal "bearing the word 'concurrent' on it." A concurrent writ must be issued within six months from the first issuing of the original writ.*

The officer, it is suggested, should make an indorsement on the copy of the original writ filed by him, of the fact of the issuing of the concurrent writ.†

In addition to the ordinary case of there being two or three defendants, concurrent writs are useful, and, indeed, often necessary, when it is not known in which of different places the defendant is likely to be met with, or when it is doubtful whether he is at home or abroad.

Rule 2.

A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service, or whereof notice in lieu of service is to be given, out of the jurisdiction; and a writ for service, or whereof notice in lieu of service is to be given, out of the jurisdic-

* *Coles v. Sherrard*, 11 Ex., 482.

† By analogy to the indorsing of the *præcipe* for the original writ filed. See Archbold's Practice, p. 55.

tion may be issued and marked as a concurrent writ with one for service within the jurisdiction.

This is Rule 2 of Order V. of the Rules of Court drawn up, in 1874, under the Principal Act.

This Rule is copied *verbatim* from section 22 of the Common Law Procedure Act, 1852, with the addition of the words, "and whereof notice, in lieu of service, is to be given," which seem to have been accidentally omitted from that section.

As to notice in lieu of service, see s. 19 of the Common Law Procedure Act, 1852, and Appendix (A), Part II., Nos. 2 and 3 to this Schedule.

ORDER VII.

DISCLOSURE BY SOLICITORS AND PLAINTIFFS.

Rule 1.

Every solicitor whose name shall be indorsed on any writ of summons shall, on demand in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority or privity; and if such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a Judge.

This is Rule 1 of Order VI. of the Rules of Court drawn up in 1876, under the Principal Act.

This Rule is copied *verbatim* from s. 7 of the Common Law Procedure Act, 1852, with the useful addition of the words, "who has been served therewith, and who has appeared thereto," after the word "defendant."

The defendant, upon making an affidavit of the facts can obtain an order to stay the proceedings.

Rule 2.

When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant, declare forthwith the names and places of residence of all the persons constituting the firm. And if the plaintiffs or their solicitors shall fail to comply with such demand, all pro-

ceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a Judge may direct. And when the names of the partners are so declared, the action shall proceed in the same manner, and the same consequences in all respects shall follow as if they had been named as the plaintiffs in the writ. But all proceedings shall, nevertheless, continue in the name of the firm.

This is Rule 2 of Order VI. of the Rules of Court drawn up in 1874, under the Principal Act.

See as to actions against partners, Order IX., Rule 6 and Order XVI., Rule 10. The present Rule contains a very useful new provision. (See now the Registration of Firms Act, 1875.)

ORDER VIII.

RENEWAL OF WRIT.

Rule 1.

No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to a Judge, or the District Registrar, for leave to renew the writ; and the Judge or Registrar, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal, and so from time to time during the currency of the renewed writ. And the writ shall in such case be renewed by being marked with a seal bearing the date of the day, month, and year of such renewal; such seal to be provided and kept for that purpose at the proper office, and to be impressed upon the writ by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in Form No. 5 in Appendix (A.),

Part I.; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons:

This is Rule 1 of Order VIII. of the Rules drawn up in 1874 under the Principal Act, "Appendix A" being substituted for "Schedule (A)" to adapt the Rule to the present Act. This Rule is founded upon s. 11 of the Common Law Procedure Act, 1852, but the provisions of that section have been considerably modified.

A writ of summons under s. 11 of the Common Law Procedure Act, 1852, was only in force for *six* months from the day of its date. This Rule says that *twelve* months shall be the maximum time during which it shall remain in force. A check, on the other hand, is put upon the renewal of writs as of course. The ceremony of an application to a Judge (or District Registrar) is interposed. Instead of the plaintiff delivering to the proper officer a *præcipe* in such form as was required to be delivered for obtaining an *alias* writ, he is to deliver to that functionary a memorandum in Form No. 5 in Appendix (A) to this Schedule (which see.) The writ will be re-sealed with a "renewal" seal, when this "renewal" memorandum has been delivered, the renewed writ will, as heretofore, itself require renewal if the defendant is not served within six calendar months from the date of renewal.*

Rule 2.

The production of a writ of summons purporting to be marked with the seal of the Court, showing the same to have been renewed in manner aforesaid shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes.

This is Rule 2 of Order VII. of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule is copied *verbatim* from s. 13 of the Common Law Procedure Act, 1852. The defendant is at liberty to rebut the evidence afforded by the production of the writ, so that the words, "*prima facie*," must be considered as inserted after the word "sufficient."†

* See Day's Common Law Procedure Acts, p. 38.

† Day's Common Law Procedure Acts, citing *Barraclough v. Greenhough*, L. R., 2, Q. B., 612, and *Fisher v. Cox*, 16 L. T., N. S. 397 Q. B., E. T., 1867.

ORDER IX.

SERVICE OF WRIT.

1. *Mode of Service.*

Rule 1.

No service of writ shall be required when the defendant, by his solicitor, agrees to accept service, and enters an appearance.

This Rule is a re-enactment of Rule 4 of the Principal Act.

As a general rule, there is no equivalent for personal service, except an undertaking by an attorney to appear.* By Reg. Gen. Hil. T., 1853, Rule 3, an attorney not entering an appearance in pursuance of his undertaking, is liable to an attachment. That rule is now Order XII., Rule 14 of this Schedule. See *Jacob v. Magnay*, L. J. 2, Q. B. 93, *Morris v. James*, 6 Dowl. 514.

The following is the form of undertaking given by Mr. Chitty,† as usually indorsed in this case on the writ of summons:—"I undertake to appear for the within-named defendant, according to the exigency of the within writ. A. A. The day of _____, 1875." The form of affidavit for obtaining the attachment may be framed upon those given by Chitty, p. 81, Book XII.‡ of his "Forms."

Rule 2.

When service is required, the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the Court or to a Judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or Judge may make such order for substituted or other service, or for the substitution of notice for service, as may seem just.

This Rule is a re-enactment of Rule 5 of the Principal Act.

See Order X., as to the necessity for an affidavit in support of an application for an order for "substituted or other service," or "for the substitution of notice for service" under this Rule.

"The manner in which personal service is now made." The question whether personal service has been effected must, in any particular instance, depend upon its peculiar facts.§ It is not necessary to leave the copy of the writ in the actual corporal possession of the defendant,|| for,

* Common Law Procedure Acts, p. 41; Chitty's, Forms, p. 59, n. (a).

† Forms of Practical Proceedings, p. 59.

‡ *Ib.* p. 884. See p. 25.

§ *Heath v. White*, 2 D. & L. 40.

|| *Digby v. Thompson*, 1 Dowl. p. 363.

whether the process server touches him and puts it in his hand, is immaterial. Personal service may be where you see a person and bring the process to his notice.* and if after your informing the defendant of the nature of the process, and tendering him the copy, he refuses to receive it, then placing it on his person,† or throwing it down in his presence,‡ would be sufficient service.

Substituted service has long been permitted in the practice of the Court of Chancery, where the question of what is sufficient service arises more frequently than at Common Law, on account of the number of defendants to every suit. The principle upon which that Court has acted in directing substituted service is clearly enunciated by Lord Cranworth in the case of *Hope v. Hope*.§ His Lordship there observed that where there is an agent in this country managing the affairs of a defendant who is abroad, and regularly communicating upon his affairs, or where he has an agent here specially managing the particular matter involved in the suit, the Court has felt that it might safely allow service upon the agent to be deemed good service abroad, because the inference was irresistible, that service so made was service on a person either impliedly authorised to accept that particular service, or who would certainly communicate the process so served to the party who was not in this country to receive it himself. The object of all service was, of course, only to give notice to the party on whom it was made: so that he might be made aware of and able to resist that which was sought against him, and when that had been substantially done, so that the Court may feel perfectly confident that service had reached him, every thing had been done that was required.

2. On particular Defendants.

Rule 3.

When husband and wife are both defendants to the action, service on the husband shall be deemed good service on the wife; but the Court or a Judge may order that the wife shall be served with or without service on the husband.

This is Rule 1, of Order VIII of the Rules drawn up, in 1874, under the Principal Act.

"Where the writ," says Mr. Archbold,|| "is against husband and wife, service on the husband will in general be sufficient." This is the practice at Common Law. The practice in Chancery is, so far, similar. "Where husband and wife," says Mr. Daniel, "are defendants, ordinary service upon the husband alone is sufficient." But he adds:—"If the husband is abroad, and cannot be served, and the subject matter of the suit arises in

* *Thompson v. Phenev*, 1 Dowl., 441.

† *Bell v. Vincent*, 7 D. & R. 233.

‡ See per Paterson, J., 1 Dowl., 443.

§ 4 De G. M. & G. 328, affirming S. C., 19 Beav, 257.

|| 1 Archbold's Practice, 199, reciting *Buncumbe v. Love*, Barnes 6; *Collins v. Shapland*, Barnes 462.

right of the wife, the *plaintiff*" may "obtain on *ex parte* motion, supported by affidavit, an order that service upon her alone, in the usual manner, shall be sufficient."*

Rule 4.

When an infant is a defendant to the action, service on his or her father or guardian, or, if none, then upon the person with whom the infant resides or under whose care he or she is, shall, unless the Court or Judge otherwise orders, be deemed good service on the infant; provided that the Court or Judge may order that service made or to be made on the infant shall be deemed good service.

This is Rule 2 of Order VIII. of the Rules drawn up in 1874 under the Principal Act.

At Common Law an infant cannot be served personally. The service must be upon his guardian.

Service on the father or guardian of the infant, and upon the person with whom or under whose care the infant is, is a method of serving infants mentioned in Order VII., Rule 3, of the Consolidated Orders of the Court of Chancery.

Under that Order service at the dwelling of the mother of the infant, the father being dead, and she married again, has been held to be sufficient,† but not service upon the infant's uncle.‡

Leave may be granted, in a suit of Chancery, to *personally* serve infants out of the jurisdiction, and upon such service, guardians *at litem* will be appointed.

Ordinary service in Chancery upon an infant defendant is effected in the same manner as upon an adult.§

Rule 5.

When a lunatic or person of unsound mind not so found by inquisition is a defendant to the action, service on the committee of the lunatic or on the person with whom the person of unsound mind resides or under whose care he or she is, shall, unless the Court or Judge otherwise orders, be deemed good service on such defendant.

This is Rule 3 of Order VIII. of the Rules of Court, drawn up, in 1874,

* Daniel's Chancery Practice, 368.

† *Hitch v. Wells*, 8 Beav. 576;

‡ *Blackmore v. Howett*, 20 L. J., 101.

§ Daniel's Chancery Practice, 368, 376.

under the Principal Act. This is a beneficial charge in the law of service. Prior to this enactment it was held at Common Law that personal service was necessary in the case of an action against a lunatic. The Courts at Westminster Hall on a literal interpretation of s. 17 of the Common Law Procedure Act have held that, as the lunatic cannot know of the writ or evade its service, they could not give the plaintiff leave to proceed, in the case of an action against a lunatic, under that section. The managers of the lunatic asylums were able to keep the process server at bay, in the case of *Williamson v. Maggs*,* on the authority of *Holmes v. Service*,† decided in 1854.

Order VII., Rule 3 of the Consolidated Orders of the Court of Chancery mentions service upon the person with whom or under whose care the defendant is, as a method of serving persons of unsound mind.

3. On Partners and other Bodies.

Rule 6.

Where partners are sued in the name of their firm, the writ shall be served either upon any one^{*} or more of the partners, or at the principal place, within[^] the jurisdiction, of the business of the partnership, upon any person having at the time of service the control or management of the partnership business there; and, subject to the Rules hereinafter contained, such service shall be deemed good service upon the firm.

This is Rule 4 of Order VIII. of the Rules of Court drawn up in 1874 under the Principal Act.

"Where parties are sued in the name of their firms." By Order XVI., Rule 10, "any two or more persons, being liable as co-partners, may be sued in the name of their respective firms."

There are no special provisions relative to the service of partners at the Common Law. The rule that where there are more defendants than one, each must be served in the same way, as if he were sued alone, applies. It has been expressly decided‡ that service on one of two (or more) partners is not, in the view of a Court of Equity, good service on the other. But it has been also expressly decided§ that where substituted service is allowed, service on one of two (or more) partners is, in the view of a Court of Equity, sufficient. It will be seen that service may be effected upon a firm, not merely by serving any one of the partners, but by serving "any person having the control or management of the partnership's business," provided that the service be upon the latter at the principal place (within the jurisdiction) of the business of the partnership.

* 28 L. J. Ex. 5 † 15 C.B. 293.

‡ *Young v. Goodson*, 2 Russ., 255.

§ *Carrington v. Cantillon*, Bunbury, 187; *Coles v. Gurney*, 1 Mad. 187; *Kinder v. Forbes*, 2 Beav., 503.

In case Partners are sued on a Bill or Note all the Partners must be served with a Copy of the original Writ.

The present rule effects a very salutary improvement of the law. Subject to the rules hereinafter contained." This, probably, refers more particularly to the next rule, which applies to "any body or number of persons, whether corporate or otherwise," and is, therefore, to some extent, in *pari materia* with the present Rule.

Rule 7.

Whenever by any statute, provision is made for service of any writ of summons, bill, petition, or other process, upon any corporation, or upon any hundred, or the inhabitants of any place, or any society or fellowship, or any body or number of persons, whether corporate or otherwise, every writ of summons may be served in the manner so provided.

This is Rule 5 of Order VIII. of the Rules of Court, drawn up in 1874 under the Principal Act.

By section 16 of the Common Law Procedure Act, 1852, every writ of summons issued against a corporation aggregate may be served on the Mayor, or other head officer, or on the Town-Clerk, Clerk, Treasurer, or Secretary of such corporation; and every such writ issued against the inhabitants of a hundred, or other like district, may be served on the High Constables thereof, or any one of the High Constables thereof; and every such writ issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place not being part of a hundred, or other like district, on some peace officer thereof. The expression, "corporation," in this enactment does not apply to a foreign corporation.* But a foreign corporation carrying on a branch business at an office in England may be sued in our Courts, and service on the head officer of the branch business under this section will be good.†

The statute 7 Wm. 4, and 1 Vict., c. 73, s. 26, provides, with reference to trading companies, or bodies of persons associated together for banking purposes, and established by letters patent under the Act, that service of any suit on the clerk‡ of the company or body, or by leaving the writ at the head office for the time being of the Company or body, or in case such clerk shall not be found or known, the service of such writ on any agent or officer employed by the Company or body, by leaving the same at the usual place of abode of such agent or officer, shall be deemed good and sufficient service on the Company or body.

By the 132nd Section of Companies' Clauses Consolidation Act (8 & 9 Vict. c. 16), any summons or writ requiring to be served upon a Company

* *Ingate v. Austrian Lloyds*, 4 C.B., N.S. 1704.

† *Newby v. Van Oppen, & Co.*, L.R. 7 Q.B. 293.

‡ The word "clerk" here means chief clerk, not a mere clerk employed under a secretary or other clerk. *Walton v. Universal Salvage Co.*, 16 M. and W. 438.

to which the Act applies may be served by being left at or transmitted through the post directed to the principal office* of the Company or one of their principal offices where there shall be more than one, or being given personally to the secretary,† or in case there be no secretary, then by being given to any one director of the Company. The Railways Consolidation Clauses Act (8 & 9 Vict. c. 20), s. 138, contains a similar provision as to service upon the companies to which it applies.

By the Companies Act, 1862, section 62, any summons required to be served upon the Company under it may be served by leaving the summons or sending it through the Post in a prepaid letter addressed to the company at their registered office.‡

4. *In particular Actions.*

Rule 8.

Service of a writ of summons in an action to recover land may, in case of vacant possession, when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property.

This is Rule 6 of Order VIII. of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule is copied from Section 170 of the Common Law Procedure Act, 1852, with the addition of the important qualification, "*When it cannot be otherwise effected.*"

Where a landlord or lessor proceeds for the recovery of a dwelling-house and other premises demised by one lease, if the dwelling-house is not occupied and the rest of the premises is in the occupation of a tenant, service of the writ of ejectment may be effected by personally serving the tenant with a copy and affixing another on the front door of the house. *Lord Clinton v. Wales*, 2 Jur. N. S., 1096, Ex., M. T., 1856.

Rule 9.

In Admiralty actions *in rem*, the writ shall be served by the Marshal or his substitutes, whether the property to be arrested be situate within the Port of London or elsewhere within the jurisdiction of the Court, and the solicitor issuing the writ shall, within six days from the service thereof, file the same in the registry from which the writ issued.

* See *Garton v. the Great Western Railway Company*, E. B. and E., 837.

† See *Doe d. Bayes v. Roe*, 16 M. and W., 142; *Doe d. Bromley v. Roe*, 8 Dowl., 858.

‡ As to the time of posting the summons and proof of service of it through the post, see section 63.

This is Rule 7 of Order VIII. of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule is copied from Rule 14 of the Rules of the Court of Admiralty, "writ" being substituted for "warrant," and "solicitor" for "proctor," and the words "from which the writ issued" being added at the end of the Rule.

Rule 10.

In Admiralty actions *in rem* service of a writ of summons against ship, freight, or cargo on board is to be effected by the Marshal or his officer nailing or affixing the original writ for a short time on the mainmast or on the single mast of the vessel, and, on taking off the process, leaving a true copy of it nailed or fixed in its place.

This is Rule 8 of Order VIII. of the Rules of Court drawn up in 1874 under the Principal Act.

"The service," observe the authors of "Admiralty Practice,"* writing with regard to Admiralty actions *in rem*, "is effected with respect to a ship, her tackle and furniture by affixing the original warrant for a short time on the main mast or single mast of the ship and by leaving a copy thereof annexed in its stead. If the cargo be on board the ship and is proceeded against specifically, and named in the warrant, or if it is not named in the warrant, but is proceeded against in respect of freight due for the transportation thereof, the arrest of the ship arrests the cargo."

Rule 11.

9. If the cargo has been landed or transhipped, service of the writ of summons to arrest the cargo and freight shall be effected by placing the writ for a short time on the cargo, and, on taking off the process, by leaving a true copy upon it.

This is Rule 9 of Order VIII. of the Rules of Court drawn up in 1874 under the Principal Act.

"If the cargo," observe the authors of "Admiralty Practice,"† "has been landed and warehoused, a separate arrest of it must be made."

Rule 12.

If the cargo be in the custody of a person who will

* Williams and Bruce on Admiralty Practice, p.p. 193, 194.

† *Ib.*, p. 194.

not permit access to it, service of the writ may be made upon the custodian.

This is Rule 10 of Order VIII. of the Rules of Court drawn up in 1874 under the Principal Act.

"If the Marshal or his substitutes," observe the authors of Admiralty Practice*, "are denied access to the warehouse where the cargo is, the arrest may be made by showing the original warrant to the warehouse keeper and leaving a copy with him."

Generally.

Rule 13.

11. The person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ shall mention the day on which such indorsement was made.

This is Rule 11 of Order VIII. of the Rules of Court drawn up in 1874, under the Principal Act.

This Rule is copied from s. 15 of the Common Law Procedure Act, 1852, the words "and he is hereby required," being omitted after the word "shall" and "in default," substituted for "under this Act."

This indorsement may be signed by a marksman, but service should not be effected by a marksman†. If the indorsement is not made, the plaintiff's attorney may be liable for such negligence when the plaintiff has been damaged by it.‡ The affidavit should show that the writs and indorsements are regular,§ and a copy of the writ should be annexed.

The affidavit cannot be made before the plaintiff's attorney or his clerk, not before the attorney is the country, if his agent in town is the attorney on the record.¶ It may, of course, subject to these remarks, be sworn before a commissioner for taking affidavits.

ORDER X.

SUBSTITUTED SERVICE.

Every application to the Court or a Judge, under Order

* Williams and Bruce's Admiralty Practice, p. 194.

† *Baker v. Coghlan* 7 C. B. 131.

‡ *Curlewis v. Broad*, 1 H. & C., 322.

§ *Wakeley v. Teesdale*, 2 L. M. & P., 85.

¶ In *Re Gray*, L.J. 21, C.B. 380. Reg. Gen. Hil. T. 1853, Rules 142 and 143.

IX., Rule 2, for an order for substituted or other service, or for the substitution of notice for service, shall be supported by an affidavit setting forth the grounds upon which the application is made.

This is Order IX. of the Rules of Court drawn up in 1874 under the Principal Act, the words "under Order IX., Rule 2" being substituted for "under Rule 5 of the Schedule to the said Act," in order to adapt the order to the present Act.

See, as to substituted service, Order IX., Rule 2, *supra*, and the note thereto.

"The application," says Mr. Daniel,* "is made by *ex parte* motion,† and must be supported by an affidavit showing what efforts have been made to serve the defendant, and that all practicable means of doing so have been exhausted,‡ and how substituted service is proposed to be effected."

The affidavit must also shew "means of knowledge."§

ORDER XI.

SERVICE OUT OF THE JURISDICTION.

Rule 1.

Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever the whole or any part of the subject-matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to

* Daniel's Chancery Practice, 375.

† *Reed v. Barton*, 4 W. R. 793, V. C. W.; *Re Boger*, 3 Jur. N. S. 930, V. C. W.

‡ *Firth v. Bush*, 9 Jur. N. S. 431, V. C. K.

§ See the form, in the Vol. of Forms, accompanying Daniel's Chancery Practice, No. 286.

be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction.

This is Rule 1 of Order X. of the Rules of Court drawn up in 1874 under the Principal Act. The provisions relative to "service out of jurisdiction" in the Principal Act will be found in Rule 6 of that Act.

This Rule is very carefully framed with a view to extending as widely as possible the right of serving a defendant out of the jurisdiction, a question which has been greatly clouded by the conflicting decisions of the Courts and Judges of Westminster Hall.

The language of the 18th section of the Common Law Procedure Act, 1852, on which these conflicting decisions arose, is as follows:—"It shall be lawful for the Court or a Judge to direct that the plaintiff shall be at liberty to proceed, upon being satisfied that there is a cause of action, which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction."

The words, "cause of action," have been held by the Court of Queen's Bench to mean, as they termed it, the *whole* cause of action, including, in the case of a contract, the formation of the contract and the breach of the contract. Unless the contract were formed and the breach of it occurred within the jurisdiction, the Court of Queen's Bench refused* to allow the plaintiff to proceed under the 18th section of the Common Law Procedure Act, 1854.

The Court of Exchequer held the same opinion in one case,† decided prior to *Allhusen v. Malgarejo*, and which seems to have misled the Court of Queen's Bench in that case; but the Court of Exchequer have, in recent cases,‡ practically overruled their former decision, though struggling to distinguish it.

The Court of Common Pleas has been consistent throughout in adhering to the liberal interpretation of the section, that, if the breach of the contract occurred within the jurisdiction it mattered not where the contract was made. It is evident that unless this construction be put upon the section, the words "or in respect of a breach of a contract made within the jurisdiction" are mere surplusage. "The cause of action" is evidently a synonym for "the breach of the contract or the tort."

The common sense view of the Court of Common Pleas, and, in its later mood, of the Court of Exchequer, has, it will be seen, been adopted by the Legislature. The perilous expression, "cause of action," has been carefully eschewed, and the cases in which the Court or a Judge will allow service out of the jurisdiction are logically classed under three heads:—First, "Whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected, or for the breach whereof damages or other relief are or is demanded, was made or entered into

* *Allhusen v. Malgarejo*, L. R. 3 Q. B. 340; *Cherry v. Thompson*, 7 W. N. 1872, p. 122, T. T.

† *Sichel v. Borch*, 2 H. and C. 954.

‡ *Durham v. Spence*, L. R. 6, Ex. 46 (Kelly, C.B., however, *dissentiente*), *Arrowsmith v. Chandler*, 52 L. T., 270, Ex., 2 Feb., 1872. (Bramwell, B., tried to distinguish *Sichel v. Borch*).

within the jurisdiction." Secondly, "Whenever there has been a breach within the jurisdiction of any contract, wherever made." Thirdly, "Whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within the jurisdiction." It will be seen that the first class corresponds with the second class mentioned in s. 18 of the Common Law Procedure Act, 1852. The third class has always been held to be within the first class mentioned in the 18th section. The second class clears up the doubts as to whether contracts entered into abroad fall under the first class of the 18th section, or do not come within the scope of the 18th section at all.

The adoption of the more liberal construction will be a great boon to the mercantile community in these days, when every country in the world is the scene of the formation of contracts by English merchants with foreigners and British subjects, resident abroad. The salutary declaration of the law by the present rule (for it hardly can be called a new enactment) is well-timed, as the Court of Queen's Bench has recently* announced its intention of adhering to its narrow construction of the 18th section.

The definition of the "subject matter of the action" would seem to be taken from the Foreign Process Acts, relative to suits in Chancery (2 and 3 Wm. IV., c. 33, ss. 1, 4 and 5 Wm. IV. c. 82, s. 1), only enlarged.† It forms an important qualification to the second class of cases mentioned in this rule. Although the contract may be formed *out of* the jurisdiction, the subject matter of the action must lie *within* it.

It has not been necessary, in the case of an order for service out of the jurisdiction in the Court of Chancery, to show, by affidavit, that the circumstances were such as to warrant the order. The Court may look at the pleadings for that purpose,‡ and, if necessary, may go into the merits of the case, it being always in the discretion of the Court whether to grant or refuse the application,§ but it acts on a *prima facie* case being made out.¶ The plaintiff takes the order at his own risk. ||

It would seem that the jurisdiction of the Chancery Division of the Supreme Court to grant orders sanctioning service out of the jurisdiction will be somewhat narrowed by the present Rule.

Rule 2.

In Probate actions service of a writ of summons or notice of a writ of summons may, by leave of the Court or Judge, be allowed out of the jurisdiction.

* *Cherry v. Thompson*, 7 W. N. 1872, p. 122, T. T.

† The word, "property," has been added, and it is very wide in its signification.

‡ *Blenkinsopp v. Blenkinsopp*, 8 Beav. 61; *Maclean v. Dawson*, 48 D. J. & J. 150.

§ *Lewis v. Baldwin*, 11 Beav. 153, 158; *Whitmore n. Ryan*, 4 Hare, 612, 617; *Innes v. Mitchell*, 4 Drew. 141. 1 De G. & J., 423; *Maclean v. Dawson*, *ubi supra*.

¶ *Meikham v. Campbell*, 24 Beav. 100; *Maclean v. Dawson*, *ubi supra*.

Brooks v. Morrison, 32 Beav. 652.

This is Rule 2 of Order X. of the Rules of Court, drawn up in 1874, under the Principal Act.

The 19th Rule of the Rules and Orders of the Court of Probate in contentious business provides that, "citations may be served upon parties resident out of Great Britain and Ireland, by the insertion of the same or of an abstract thereof, settled and signed by one of the Registrars, as an advertisement, in such of the morning and evening London newspapers, and, if necessary, in such local newspapers, at such intervals as the Judge or a Registrar may direct, *provided that in any case the Judge or a Registrar may direct a citation to be served personally.* If the party cited be abroad, having an agent resident in England, such agent must be served with a true copy of the citation."

Rule 3.

Every application for an order for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by evidence, by affidavit, or otherwise, showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made.

This is Rule 3 of Order X. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is founded on the Chancery Practice. By Order X., Rule 7, subsection 1, of the Consolidated Order of the Court of Chancery, the Court upon application supported by such evidence as shall satisfy the Court in what place or country the defendant is, may order that a copy of the Bill may be served on him there or within such limits as the Court shall think fit to direct.

It is now established that, under this order, the Court of Chancery may direct service out of the jurisdiction in any suit whatever.*

Rule 4.

Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given.

This is Rule 4 of Order X. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is also founded on the Chancery Practice. It is copied *verbatim* from Order X., Rule 7, subsection (2), of the Consolidated Orders of the Court of Chancery.

* See the cases collected in note (o) p. 375 of Daniel's Chancery Practice.

Rule 5.

Notice in lieu of service shall be given in the manner in which writs of summons are served.

This is Rule 5 of Order X. of the Rules of Court, drawn up in 1874, under the Principal Act.

Presumably, notice in lieu of service, is confined to the case of actions against foreigners residing out of the jurisdiction, pursuant to section 19 of the Common Law Procedure Act, 1852.*

ORDER XII.

APPEARANCE.

Rule 1.

Except in the cases otherwise provided for by these rules a defendant shall enter his appearance in London.

This is Rule 1 of Order XII. of the Rules of Court, drawn up in 1874, under the Principal Act.

"London" it is to be supposed, here includes Middlesex.

"Except in the cases otherwise provided for." This exception relates to appearances in District Registers, as to which see the Rules which follow.

Rule 2.

If any defendant to a writ issued in a District Registry resides or carries on business within the district, he shall appear in the District Registry.

This is Rule 2 of Order XI. of the Rules of Court, drawn up in 1874, under the Principal Act.

As to the issuing of writs from District Registries, see section 64 of the Principal Act, and Order V., Rule 1, and Order XXXV. of the present Schedule.

It will be perceived that the present Rule is imperative, *not allowing the defendant any option* as to the place in which he is to enter an appearance. The course which he may take, "as of right," but only *after* appearance, to remove the action to London is prescribed by Order XXXV., Rules 11-14.

Rule 3.

If any defendant neither resides nor carries on business in the district, he may appear either in the District Registry or in London.

* But this is nowhere so stated in the present Act, or in the Principal Act.

This is Rule 3 of Order XI. of the Rules of Court, drawn up in 1874, under the Principal Act.

In this case the defendant has the *option* of selecting the place in which he shall enter an appearance. He need not wait till after appearance to show his preference for London; but may show it at once by entering an appearance in London.

Rule 4.

If a sole defendant appears, or all the defendants appear in the District Registry, or if all the defendants, who appear, appear in the District Registry and the others make default in appearance, then, subject to the power of removal hereinafter provided, the action shall proceed in the District Registry.

This is Rule 4 of Order XI. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is imperative—"the action *shall* proceed in the District Registry."

"Subject to the power of removal hereinafter provided," i.e., by Order XXXV., Rules 11-14.

Rule 5.

If the defendant appears, or any of the defendants appear, in London, the action shall proceed in London; provided that if the Court or a Judge shall be satisfied that the defendant appearing in London is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such Court or Judge may order that the action may proceed in the District Registry notwithstanding such appearance in London.

This is Rule 5 of Order XI. of the Rules of Court, drawn up in 1874, under the Principal Act.

There is a power of applying for the removal of an action from London to a District Registry, under Order XXXV., Rule 13, *infra*.

Rule 6.

A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing dated on the day of the delivering the same, and

containing the name of the defendant's solicitor, or stating that the defendant defends in person. A defendant who appears elsewhere than where the writ is issued shall on the same day give notice to the plaintiff of his appearance either by notice in writing served in the ordinary way or by prepaid letter posted on that day in due course of post.

The first clause of this Rule is Rule 6 of Order XI. of the Rules of Court, drawn up in 1874, under the Principal Act.

The first clause of this Rule is founded on s. 31 of the Common Law Procedure Act, 1852. The form of the memorandum is given in that section. The form of the memorandum mentioned in the present Rule, is given in Appendix (A), Part I., No. 6. (See Rule 10 of this Order.)

The memorandum may be delivered by a third person on the defendant's behalf, though such third person is not an attorney. *Oake v. Moorecroft*, L.R. 5 Q. B. 76.

Rule 7.

The solicitor of a defendant appearing by a solicitor shall state in such memorandum his place of business, and, if the appearance is entered in the London office, a place, to be called his "address for service," which shall not be more than three miles from Temple Bar, and, if the appearance is entered in a District Registry, a place, to be called his "address for service," which shall be within the district.

This is Rule 7 of Order XI. of the Rules of Court, drawn up in 1874, under the Principal Act.

Rule 8.

A defendant appearing in person shall state in such memorandum his address, and, if the appearance is entered in the London office, a place, to be called his "address for service," which shall not be more than three miles from Temple Bar, and, if the appearance is entered in a District Registry, a place, to be called his "address for service," which shall be within the district.

This is Rule 8 of Order XI. of the Rules of Court, drawn up in 1874, under the Principal Act.

See as to the subject-matter of this Rule, s. 30 of the Common Law Procedure Act, 1852, and Rule 166 of the Reg. Gen., Hil. T., 1853. See also Order IV., Rule 2, *supra*, and the note thereto. The indorsement appears to be substituted for the entry in a book.

Rule 9.

If the memorandum does not contain such address, it shall not be received; and if any such address shall be illusory or fictitious, the appearance may be set aside by the Court or a Judge, on the application of the plaintiff.

This is Rule 9 of Order XI. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied from s. 30 of the Common-Law Procedure Act, 1852, the words "on the application of the plaintiff," being added.

Rule 10.

The Memorandum of Appearance shall be in the Form No. 6, Appendix (A.), Part I., with such variations as the circumstances of the case may require.

This is Rule 10 of Order XI. of the Rules of Court, drawn up in 1874, under the Principal Act, the words "Appendix (A.);" being substituted for "Schedule (A.);" in order to adapt the Rule to the Present Act.

The analogous form is given in s. 31 of the Common Law Procedure Act, 1852. It has been laid down* that that Act imperatively requires that the form given in the 31st section, or one to the like effect, shall be used. The present Rule admits of "such variations as the circumstances of the case may require" a somewhat loose phrase.

* The whole style of the new form is different from the old appearance-piece. It is in effect a *præcipe* to the officer to enter an appearance, which by the next Rule, the officer is enjoined to do. A reference to the forms accompanying Daniel's Chancery Practice† will show that this new kind of memorandum is borrowed from the practice of the Court of Chancery. Nothing is said about *filing* it, or giving notice of it. (See Notanda.)

Rule 11.

Upon receipt of a Memorandum of Appearance, the officer shall forthwith enter the appearance in the cause book.

This is Rule 11 of Order XI. of the Rules of Court, drawn up in 1874, under the Principal Act.

* Per Pollock C.B., 4 D. & L. 297.

† No. 484.

See note to Order V., Rule 8, as to the additional labour which this Rule will involve.

The *præcipe* to enter an appearance is, in Chancery Practice, "left at the seat of the Record and Writ Clerk, to whose division the cause is attached."*

The cause-book is the same as that previously referred to in Order V., Rule 8. See the note to that Rule, with regard to the inconvenience of the introduction of this practice into Common Law proceedings.

Rule 12.

Where partners are sued in the name of their firm, they shall appear individually in their own names. But all subsequent proceedings shall, nevertheless, continue in the name of the firm.

This is Rule 12 of Order XI. of the Rules of Court, drawn up in 1874, under the Principal Act (See Rule 11 of the Principal Act).

See Order IX., Rule 6, *supra*, and the notes thereto.

Rule 13.

If two or more defendants in the same action shall appear by the same solicitor and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum.

This is Rule 13 of Order XI. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied *verbatim* from Reg. Gen. Hil. T., 1853, Rule 2, except that "solicitor" is substituted for "attorney," and "memorandum" for "appearance."

Rule 14.

A solicitor not entering an appearance in pursuance of his written undertaking so to do on behalf of any defendant shall be liable to an attachment.

This is Rule 14 of Order XI. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied *verbatim* from Reg. Gen. Hil. T., 1853, Rule 3, with the important modification that the word, "written" is inserted before the word "undertaking." See as to this Rule, Order IX., Rule 1, *supra*.

* Daniel's Chancery Practice, 459-60.

Rule 15.

A defendant may appear at any time before judgment. If he appear at any time after the time limited for appearance he shall, on the same day, give notice thereof to the plaintiff's solicitor, or to the plaintiff himself if he sues in person, and he shall not, unless the Court or a Judge otherwise orders, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ.

This is Rule 15 of Order XI. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is founded on s. 29 of the Common Law Procedure Act, 1852; but the frame of it is rather different, the proviso relating to notice being thrown into a positive form, instead of being inserted parenthetically.

The important words, "unless the Court or a Judge otherwise orders," are also introduced after the word, "not."

Rule 16.

In Probate actions any person not named in the writ may intervene and appear in the action as heretofore, on filing an affidavit showing how he is interested in the estate of the deceased.

This is Rule 16 of Order XI. of the Rules of Court, drawn up in 1874, under the Principal Act.

It was a rule of the Prerogative Court, that, when a suit was pending, a party, whose interest might, by possibility, be affected by the suit, should be allowed to intervene to protect his interest.* He was called an "intervener."

By Rule 6 of the Rules and Orders in contentious business of the Court of Probate, "parties who, previously to the passing of the Court of Probate Act, 1857, had a right to intervene in a cause, may do so, with leave of the Judge or of the Registrars, obtained by order or summons, subject to the same limitations and the same rules as to costs as in the Prerogative Court."

"The distinction," it has been observed,† "between an intervener and a defendant, properly so-called, would seem to be this, viz., that an intervener is a person who puts in an appearance in a suit, while the suit is pending. If a person puts in an appearance in answer to a citation, served upon him by the plaintiff at the commencement of the suit, he is called a defendant."

* Coote and Tristram's Probate Practice, 257.

† *Ib.*, p. 257.

Rule 17.

In an Admiralty action *in rem* any person not named in the writ may intervene and appear as heretofore, on filing an affidavit showing that he is interested in the *res* under arrest, or in the fund in the registry.

This is Rule 17 of Order XI. of the Rules of Court drawn up in 1874 under the Principal Act.

The warrant or citation *in rem* calls upon all persons who have or claim to have any right, title or interest in the property to enter in the Registry an appearance in the cause. As a general rule, not merely the legal owner, but any person having any title to the property proceeded against may appear and defend *pro interesse suo*.*

Rule 18.

Any person not named as a defendant in a writ of summons for the recovery of land may by leave of the Court or Judge appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant.

This is Rule 18 of Order XI. of the Rules of Court drawn up in 1874 under the Principal Act.

This rule is copied *verbatim* from section 172 of the Common Law Procedure Act, 1852.

Persons claiming in opposition to the title of the tenant in possession were not admitted to defend under that section.†

The affidavit of the person applying for leave to appear and defend must show that he is in possession of the premises, by himself or his tenant. The Court will not, however, consider nice questions as to the applicant's right of possession.‡

A form of affidavit by an applicant for leave to appear in this case will be found in Chitty's "Forms," § and also a form of the Judge's Order, giving him leave to appear.||

Rule 19.

Any person appearing to defend an action for the recovery of land as landlord in respect of property whereof

* Williams and Bruce's Admiralty Practice, p. 199.

† *Doe d. Horton v. Rys*, 2 Y. & J. 88.

‡ *Croft v. Lumley*, 4 E. & B. 614.

§ P. 535.

|| P. 536.

he is in possession only by his tenant, shall state in his appearance that he appears as landlord.

This is Rule 19 of Order XI. of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule is copied *verbatim* from section 173 of the Common Law Procedure Act, 1852.

The tenant will not, by the landlord being joined, be precluded from setting up any defence which he may have as tenant in possession.*

A form of appearance by a landlord not named in the writ will be found in Chitty's "Forms."†

Rule 20.

Where a person not named as defendant in any writ of summons for the recovery of land has obtained leave of the Court or Judge to appear and defend, he shall enter an appearance according to the foregoing rules, intituled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings be named as a party defendant to the action.

This is Rule 20 of Order XI. of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule is copied from Reg. Gen., Hil. T., 1853, Rule 113, with the addition of the words at the end, "and shall in all subsequent proceedings be named as a party defendant to the action." A form of notice of appearance by a party not named in the writ will be found in Chitty's "Forms."‡

Rule 21.

Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his Memorandum of Appearance or in a notice intituled in the cause, and signed by him or his solicitor; such notice to

* *Doe d. Wawn v. Horn*, 3 M. and W., 333. † P. 536. ‡ P. 537.

be served within four days after appearance; and an appearance where the defence is not so limited shall be deemed an appearance to defend for the whole.

This is Rule 21 of Order XI. of the Rules of Court drawn up in 1874 under the Judicature Act.

This Rule is copied from section 174 of the Common Law Procedure Act, 1852, with the addition of the words, "in his memorandum of appearance."

As to the form of the notice, see the next section.

Rule 22.

The notice mentioned in the last preceding Rule may be in the Form No. 7 in Part I. of Appendix (A) hereto,* with such variations as circumstances may require.

This is Rule 22 of Order XI. of the Rules of Court drawn up in 1874 under the Principal Act, Appendix (A) being substituted for Schedule (A), in order to adapt the Rule to the present Act.

A form of notice in this case is given in Chitty's "Forms," p. 537.

ORDER XIII.

DEFAULT OF APPEARANCE.

Rule 1.

Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind not so found by inquisition, the plaintiff may apply to the Court or a Judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose

*The form in Appendix (A) contemplates the possibility of the action of ejectment being brought in *Chancery*.

care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the Court or Judge at the time of hearing such application shall dispense with such last-mentioned service.

This is Rule 1 of Order XII. of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule is copied, *mutatis mutandis*, from Order VII, Rule 3, of the Consolidated Orders of the Court of Chancery. There are, however, two important alterations. One is the substitution of "some proper person" for "one of the solicitors of the Court." In the Court of Chancery the Solicitor to the Suitor's Fund is generally appointed.* But where the application is made by the defendant's family, any suitable person may be appointed.† The other is that persons "of weak mind" are omitted. The practice under this Rule only applies to persons "of unsound mind." In the Court of Chancery persons of great age and incapable of giving a continuous attention to business, have been ordered to be defended by guardian *ad litem*.‡ The application in the Court of Chancery was by motion, and the order might have been obtained of course.§ Where the guardian dies, a special application for the appointment of a new one becomes necessary.||

As to what is sufficient service on an infant, or a person of unsound mind not so found by inquisition, see Order IX., Rules 4 and 5, and the notes thereto.¶

Forms of affidavit in support of the motion will be found in the "Forms" accompanying Daniel's "Chancery Practice," Nos. 119 and 135.

Rule 2.

Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the following Rules of this Order, or under Order XV., Rule 1, he shall, before taking such proceeding upon

* *McKerrakin v. Cort*, 7 Beav., 347; *Thomas v. Thomas*, 7 Beav., 47; *Biddulph v. Camoys*, 9 Beav., 548; *Sheppard v. Harris*, L. J. Ch., 104.

† *Charlton v. West*, 3 D. F. J., 156; and see *Moore v. Platel*, 7 Beav., 583; and *Biddulph v. Dayrell*, 15 L. J. Ch., 320.

‡ *Newman v. Selfe*, 11 W. R., 764; *Steel v. Cobb*, 11 W. R., 298.

§ *Re Barrington*, 27 Beav., 272.

|| *Needham v. Smith*, 6 Beav., 130.

¶ See also Morgan & Chute's Chancery Acts and Orders, pp. 400-402 Daniel's Chancery Practice, pp. 147, 160.

default, file an affidavit of service, or of notice in lieu of service, as the case may be.

This is Rule 2 of Order XII. of the Rules of Court drawn up in 1874 under the Principal Act, "Order XV., Rule 1," being substituted for "Rules 7 and 8 of the Schedule to the said Act" [of 1873], in order to adapt the Rule to the present Act.

This Rule is founded upon the provisions of sections 27 and 28 of the Common Law Procedure Act, 1852. Forms of the affidavit required by this Rule will be found in Chitty's "Forms," pp. 60, 69, and 70.*

"Notice in lieu of service" is adapted to the case of a foreigner resident out of the jurisdiction.†

It would appear not to be necessary now to make any affidavit pursuant to sections 18 and 19 of the Common Law Procedure Act, to get leave to proceed against a defendant resident out of the jurisdiction, as the practice has been entirely altered by Order II., Rule 4, and Order XI, Rule 3, an affidavit being required before a defendant resident out of the jurisdiction can be served at all with a copy or notice of the writ of summons. But "*leave to proceed*" will still be necessary, see form of writ of summons, App. (A), part 1, Nos. 2 and 3.

The present Rule is evidently applicable to the case of a defendant resident out of the jurisdiction, as well as to that of a defendant resident within it; and the only affidavits, it would appear, that will be required in the former case will be, first, one when applying for leave to serve the defendant resident out of the jurisdiction; and, secondly, one before taking proceedings in default of appearance by such defendant.

Rule 3.

In case of non-appearance by the defendant where the writ of summons is specially indorsed, under Order III., Rule 6, the plaintiff may sign final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, but it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may seem just.

This Rule is a re-enactment of the second part of Rule 7 of the Principal Act, with the addition of the words, "under Order III., Rule 6."

This Rule is copied from the 27th section of the Common Law Procedure Act, 1852, and is founded on the recommendations of the Judicature Commission. (See note to Order III., Rule 6.)

It will be perceived that no mention is made of any proof of the amount of the debtor's damages upon a writ of inquiry or before one of the masters,

* The forms at pp. 69 and 70 are for leave "to proceed;" but they can easily be adapted to proceedings in default of appearance.

† Common Law Procedure Act, 1852, s. 19.

in the case of a defendant resident in the jurisdiction as exacted by sections 18 and 19 of the Common Law Procedure Act. This case appears now to fall under the general law. (See Notanda.)

Rule 4.

Where there are several defendants to a writ specially indorsed for a debt or liquidated demand in money, under Order III., Rule 6, and one or more of them appear to the writ, and another or others of them do not appear, the plaintiff may enter final judgment against such as have not appeared, and may issue execution upon such judgment without prejudice to his right to proceed with his action against such as have appeared.

This is Rule 3 of Order XII. of the Rules of Court drawn up in 1874 under the Principal Act. See Order XIV., Rule 5, where the same principle is adopted.

This Rule is taken from section 33 of the Common Law Procedure Act, 1852, with this important alteration, that the claim of the plaintiff against the defendants who have appeared is treated as joint *and several*, and, consequently, as not in any way prejudiced by his entering final judgment against the defendants who have not appeared, and issuing execution thereupon.

Under the old practice, the plaintiff, if he signed judgment against the defendants who had not appeared, and issued execution upon such judgment, was to be taken to have abandoned his action against the defendant (or defendants) who had appeared. The alternative formerly presented by section 33 of the Common Law Procedure Act, 1852,* to a plaintiff suing for a debt several defendants, one or more of whom did not appear, was not an inviting one.

Rule 5.

Where the defendant fails to appear to the writ of summons, and the writ is not specially indorsed, but the plaintiff's claim is for a debt or liquidated demand only, no statement of claim need be delivered, but the plaintiff may file an affidavit of service or notice in lieu of service, as the case may be, and a statement of the particulars of his claim in respect of the causes of action stated in the

* See the note to that section in Day's Common Law Procedure Acts, pp. 69, 70.

indorsement upon the writ, and may, after the expiration of eight days, enter final judgment for the amount shown thereby and costs to be taxed, provided that the amount shall not be more than the sum indorsed upon the writ besides costs.

This is Rule 4 of Order XII. of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule is a considerable improvement on section 28 of the Common Law Procedure Act, 1852, for which it is, *pro tanto*, substituted. That enactment required that a declaration should in this case be filed, and it was only in the event of no plea being pleaded to it within eight days that final judgment could be signed. No statement of claim (declaration) need now be delivered.

It will be perceived that this Rule only applies when the plaintiff's demand is for a *debt or liquidated demand in money* only, the writ not being specially indorsed. The next Rule applies to a case where the plaintiff's claim is for detention of goods and pecuniary damages, or either of them; in which case, of course, the writ cannot be specially indorsed.*

"A statement of the particulars of the claim." This statement, it is apprehended, will be similar to the one which might have been *specially* indorsed on the writ; as to the form of which, see Appendix (A), Part II., section 7.

"After the expiration of eight days"—i.e., from the date of the filing of the affidavit of service and statement of particulars. Under the old practice, the eight days ran from the time of filing a declaration; and if the defendant pleaded within these eight days, final judgment could not have been signed.

"The amount shewn thereby,"—i.e., by the particulars contained in the statement. Under the old practice the plaintiff signed final judgment for "an amount not exceeding the amount indorsed on the writ of summons, with interest at the rate specified, if any."† A similar limitation is imposed in the present Rule.

"The amount shall not be more than the sum indorsed upon the writ." It will be perceived that the words, "with interest at the rate specified," are omitted. The reason of this omission probably is that the money claim, where the writ is indorsed with the amount, but not specially indorsed with the particulars of the claim, is much more fully set out under the new practice than under the old, interest being specified where any is alleged to be due.‡ (See the Forms, Appendix (A), Part II., section 2.)

The word "specified" in section 28 of the Common Law Procedure Act, 1852, probably meant "specified in the declaration."

* By section 93 of the Common Law Procedure Act, 1852, "in actions where the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default shall be final."

† Common Law Procedure Act, 1852, section 28.

‡ Still it is to be observed that the interest is to be expressly added by Rule 3, where the writ is *specially* indorsed, although the particulars there are still more full.

"Costs to be taxed." Under the section just referred to, the costs were only to be taxed when the plaintiff claimed more than "the sum fixed by the Masters for costs."

Rule 6.

Where the defendant fails to appear to the writ of summons, and the plaintiff's claim is not for a debt or liquidated demand only, but for detention of goods and pecuniary damages, or either of them, no statement of claim need be delivered, but interlocutory judgment may be entered and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons. But the Court or a Judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way in which any question arising in an action may be tried.

This is Rule 5 of Order XII. of the Rules of Court drawn up in 1874 under the Principal Act.

Where the plaintiff is entitled to enter interlocutory judgment under this Rule, and the writ of summons issues out of a District Registry, such interlocutory judgment (and, when damages have been assessed, final judgment) is to be entered in the District Registry, unless the Court or a Judge shall otherwise order. Order XXXV., Rule 2.

"No statement of claim need be delivered." See section 28 of the Common Law Procedure Act, which required in this case, as in the case of a debt or liquidated demand, that "*a declaration should be filed.*" (See note to last section, Rule 1.)

Where the judgment is "interlocutory" merely—*i.e.*, for unliquidated damages—the plaintiff's title to damages is thereby established; but *the amount* of them yet remains to be ascertained. Under the old practice, this was done by a reference to the master, or by means of a writ of inquiry.*

A reference to a Master was a more expeditious and less expensive mode of proceeding than executing a writ of inquiry. The Court was in the habit of referring it to the Master to compute damages, where the damages were a mere matter of calculation of figures, even before the Common Law Procedure Act, 1852, and by the 94th section of that Act the legislature expressly sanctioned references to the Master in cases where the amount of damages was "*substantially* a matter of calculation." The Writ of Inquiry is usually executed before the Sheriff or his deputy, who

* Archibold's "Practice," p. 990.

in London is the Secondary, *M. de Jersey*. The inquest is taken nearly in the same manner as at a trial at *Nisi Prius*. All the plaintiff, however, has to prove, is *the quantum* of the damages,* and the defendant, therefore, cannot go into any evidence of matter tantamount to a defence of the action or any part of it, and which he might have pleaded.† Though he brings forward no evidence at all in support of his claim, the plaintiff must have nominal damages, at least, given him by the inquest. The writ is issued, as of course, without obtaining any order of the Court for the purpose, except when it is to be executed before a Judge.

In the case of a reference to the Master, an Order of the Court or a Judge is necessary. It is apprehended that the present Rule is not intended to interfere with the previous practice of referring the question of the *quantum* of damages to the Master. The powers of Masters under the new practice are defined in Order LIV., *infra*.

Where the action proceeds in a District Registry, the reference, it is apprehended, would be to the District Registrars, who are armed with all the powers of Masters.‡

The present Rule says, that "the Court or a Judge may order that the damages shall be ascertained in any way in which any question arising in an action may be tried." By s. 57 of the Principal Act, "the Court or a Judge may, in any cause or matter, order any question arising therein to be tried either before an official or before a special referee."

Rule 7.

In case no appearance shall be entered in an action for the recovery of land, within the time limited for appearance, or if an appearance be entered, but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply.

This is Rule 6 of Order XII. of the Rules of Court drawn up in 1874 under the Principal Act.

The Rule is copied from s. 177 of the Common Law Procedure Act, 1852.

Rule 8.

Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, upon a writ for the recovery of land, he may enter judgment as in the last preceding Rule mentioned for the land,

* *De Gaillon v. L' Aigle*, B. and P. 368.

† *Speck v. Phillips*, 5 M. and W., 279.

‡ See Order XXXV., Rule 4.

and may proceed as in the other preceding Rules of this Order as to such other claim so indorsed.

This is Rule 7 of Order XII. of the Rules of Court drawn up in 1874 under the Principal Act.

See as to this Rule s. 214 of the Common Law Procedure Act, 1852.

Under the old practice it was sometimes more prudent not to proceed for mesne profits when the defendant did not appear.*

Rule 9.

In actions assigned by the 34th section of the Act to the Chancery Division, and in Probate actions, and in all other actions not by the Rules in this Order otherwise specially provided for, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service, the action may proceed as if such party had appeared.

This is Rule 8 of Order XII. of the Rules of Court drawn up in 1874 under the Principal Act.

This provision is new. In the Court of Chancery the practice has been † *for the plaintiff to enter an appearance for the defendant*, when the latter has made default in appearance. In the Court of Probate the practice has been to proceed *without any defendant*, when the defendant makes default in appearance.‡

Rule 10.

In an Admiralty action *in rem*, in which an appearance has not been entered, the plaintiff may proceed as follows:—

(a.) He may, after the expiration of twelve days from the filing of the writ of summons, take out a notice of sale, to be advertised by him in two or more public journals to be from time to time appointed by the Judge.

(b.) After the expiration of six days from the

* Day's Common Law Procedure Acts, p 210, 4th ed. (1872.)

† Rules 3, 4 and 7 of Order X., of the Consolidated Orders of the Court of Chancery.

‡ Coote and Tristram's Probate Practice, p. 565.

advertisement of the notice of sale in the said journals, if an appearance has not been entered, the plaintiff shall file in the Registry an affidavit to the effect that the said notices have been duly advertised, with copies of the journals annexed, as also such proofs as may be necessary to establish the claim, and a notice of motion to have the property sold.

(c.) If, when the motion comes before the Judge, he is satisfied that the claim is well founded, he may order the property to be appraised and sold, and the proceeds to be paid into the Registry.

(d.) If there be two or more actions by default pending against the same property, it shall not be necessary to take out a notice of sale in more than one of the actions; but if the plaintiff in the first action does not, within eighteen days from the filing of the writ in that action, take out and advertise the notice of sale, the plaintiff in the second or any subsequent action may take out and advertise the notice of sale, if he shall have filed in the Registry a writ of summons *in rem* in such second or subsequent action.

(e.) Within six days from the time when the proceeds have been paid into the Registry, the plaintiff in each action shall, if he has not previously done so, file his proofs in the Registry, and have the action placed on the list for hearing.

(f.) In an action of possession, after the expiration of six days from the filing of the writ, if an appearance has not been entered, the plaintiff may, on filing in the Registry a memorandum, take out a notice of proceeding in the action, to be advertised by him in two or more public journals to be from time to time appointed by the Judge.

(g.) After the expiration of six days from the advertisement of the notice of proceeding in the said journals, if an appearance has not been entered, the plaintiff shall file in the Registry an affidavit to the effect that the notice has been duly advertised with copies of the journals annexed, as also such proofs as may be necessary to establish the action, and shall have the action placed on the list for hearing.

(h.) If when the action comes before the Judge he is satisfied that the claim is well founded, he may pronounce for the same, and decree possession of the vessel accordingly.

This is Rule 9 of Order XII. of the Rules of Court, drawn up in 1874 under the Principal Act.

The Rule is copied *verbatim* from the Rules, Orders and Regulations for the High Court of Admiralty (made in pursuance of the provisions of the 3 and 4 Vict., cc. 65 and 66, and 17 and 18 Vict. c. 78), Rules 18 to 26.*

ORDER XIV.

LEAVE TO DEFEND WHERE WRIT SPECIALLY INDORSED.

Rule 1.

Where the defendant appears on a writ of summons specially indorsed, under Order III., Rule 6, the plaintiff may, on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action, call on the defendant to show cause before the Court or a Judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs; and the Court or Judge may, unless the defendant, by affidavit or otherwise, satisfy the Court or Judge that he has a good defence to the action on the merits, or disclose such facts as the Court or Judge may think sufficient to entitle him to be per-

* See them in the Appendix to Williams and Bruce's Admiralty Practice, pp. xxxi., xxxii. The only alteration is the substitution of the plaintiff for his "proctor."

mitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly.

This Rule is a re-enactment of the third part of Rule 7 of the Principal Act, with the addition of the words "under Order III., Rule 6," and the omission of the words at the end, "permission to defend the action may be granted to the defendant on such terms or conditions, if any, as the Judge or Court may think just."

The omitted words appear as Rule 6 of this Order, *infra*.

As to the time within which the defendant is to deliver his defence, where he is permitted to defend the action under this Rule, see Order XXII., Rule 3.

The present Order contains an important improvement on sec. 27 of the Common Law Procedure Act, 1852. It is founded on the following recommendation of the Judicature Commission* :—"Further, in all cases in which a special indorsement has been made on a writ, and the defendant has appeared, the plaintiff should be entitled, on affidavit verifying the cause of action and swearing that, in his belief, there is no defence, to take out a summons to show cause why he should not be at liberty to sign judgment: upon which summons such order may be made as the justice of the case may require."

Rule 2.

The application by the plaintiff for leave to enter final judgment under the last preceding Rule shall be made by summons returnable not less than two clear days after service.

This is Rule 1 of Order XIII. of the Rules of Court drawn up in 1874 under the Principal Act, "under the last preceding Rule" being substituted for "after appearance to a writ specially indorsed under Rule 7 of the Schedule to the said Act," in order to adapt the Rule to the present Act.

The Judicature Commission recommended † that the plaintiff should "take out a summons" in this case.

Rule 3.

The defendant may show cause against such application by offering to bring into Court the sum indorsed on the writ, or by affidavit. In such affidavit he shall state whether the defence he alleges goes to the whole or to part only, and if so, to what part, of the plaintiff's claim. And the Judge may, if he think fit, order the defendant to attend

* First Report, p. 11.

† *Ibid*.

and be examined upon oath ; or to produce any books or documents or copies of or extracts therefrom.

This is Rule 2 of Order XIII. of the Rules of Court drawn up in 1874 under the Principal Act.

In this and the following Rules, the details of the recommendation of the Judicature Commission (cited under Rule 1), have been very carefully worked out.

A speedy remedy against defendants, who seek to defeat by delay their creditors, will now be available, in the case of liquidated demands, specially endorsed.

Rule 4.

If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted to be due, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise, as the Judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim.

This is Rule 3 of Order XIII. of the Rules of Court drawn up in 1874 under the Principal Act.

See note to Rule 3.

Rule 5.

If it appears to the Judge that any defendant has a good defence to, or ought to be permitted to defend, the action, and that any other defendant has not such defence, and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former.

This is Rule 4 of Order XIII. of the Rules of Court drawn up in 1874 under the Principal Act.

See Order XIII., Rule 4, where the same principle is adopted. See also s. 33 of the Common Law Procedure Act, 1852.

Rule 6.

Leave to defend may be given unconditionally, or subject to such terms as to giving security, or otherwise, as the Court or a Judge may think fit.

This Rule is a re-enactment of the latter portion of the third part of Rule 7 of the Principal Act, omitted from Order XIV., Rule 1, *supra*. Contrary to the principle on which the Rules of Court of 1874 are drawn up, this Rule, though forming part of the Schedule to the Principal Act, is repeated in Order XIII. Rule 5, of these Rules of Court.

"Leave to defend," *i.e.*, under the circumstances mentioned in the previous Rules of this Order.

ORDER XV.

APPLICATION FOR ACCOUNT WHERE WRIT INDORSED UNDER ORDER III., RULE 8.

Rule 1.

In default of appearance to a summons indorsed under Order III., Rule 8, and after appearance, unless, the defendant by affidavit or otherwise satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases, shall be forthwith made.

This Rule is a re-enactment of the second part of Rule 8, of the Principal Act, "to a summons indorsed under Order III., Rule 8," being substituted for "on such summons," in order to adapt the Rule to the present Act.

See Order XIII., Rule 2, as to filing affidavit of service or notice in lieu of it under this Rule.

This Rule is copied from the recommendations of the Judicature Commission: *—"In cases of ordinary account, as in the case of a partnership or executorship or ordinary trust account, when nothing more is required, in the first instance than an account, the writ should be specially endorsed, and in default of appearance or after appearance, unless the defendant shall satisfy a Judge that there is really some preliminary question to be tried, an order for the account with all usual directions should be made forthwith."

Rule 2.

An application for such order as mentioned in the last preceding Rule shall be made by summons, and be supported by an affidavit filed on behalf of the plaintiff,

* First Report, p. 11.

stating concisely the grounds of his claim to an account. The application may be made at any time after the time for entering an appearance has expired.

This is Order XIV. of the Rules of Court drawn up in 1874 under the Principal Act, "for such Order as mentioned in the last preceding Rule," being substituted for "an account under Rule 8 of the Schedule to the said Act," in order to adapt the Rule to the present Act.

"The application shall be made by summons," as under Order XIV., Rule 2.

ORDER XVI.

PARTIES.

Rule 1.

All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the Court in disposing of the costs of the action shall otherwise direct.

This is Rule 1 of Order XV. of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule is taken from Section 19 of the Common Law Procedure Act, 1860, which Mr. Day has pronounced * to be "a very valuable enactment."

The Common Law Commissioners suggested that plaintiffs should be entrusted with the right of bringing their actions in the names of all the persons in whom the legal right might be supposed to exist, leaving it to the Court to give judgment in favour of the person or persons who might be found to be entitled to recover. The Legislature gave effect to this suggestion by enacting the 19th section of Common Law Procedure Act, 1860. The old rule, requiring an action to be brought in the name only of the person in which the right of action was vested, was thus abrogated.

The present Rule wisely retains the provision of s. 19 of the Common Law Procedure Act 1860, as to extra costs needlessly occasioned to an unsuccessful defendant.

The law at the time of the passing of the Common Law Procedure

* Common Law Procedure Acts, p. 364.

Act, 1852, with reference to the mis-joinder and non-joinder of plaintiffs and defendants, is thus stated by the Common Law Commissioners:—*
 “In actions on contract, the omission of a party as plaintiff who ought to be joined, or as the joinder of a party who ought not to be joined, may be fatal to the action; so the joinder of a person as defendant, who ought not to be joined, is likewise fatal; whilst the omission of a party as defendant who ought to be joined can only be taken advantage of by a plea in abatement. In actions of tort the joinder of a party, who ought not to be plaintiff, is fatal; whilst the non-joinder of a party, who ought to be a co-plaintiff, can only be taken advantage of by a plea in abatement; and in such actions the joinder of persons, who are not liable as defendants, only entitles them to an acquittal; and the non-joinder of persons jointly liable is of no consequence.”

The 34th and five following sections of the Common Law Procedure Act, 1852, contained elaborate provisions for amending the proceedings, so as to save the plaintiff from defeat in his action through the mis-joinder or non-joinder of plaintiffs or defendants. Some of the provisions of these sections are noticed in the notes to the subsequent Rules of this Order.

Rule 2.

Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the Court or a Judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as may seem just.

This is Rule 3 of Order XV. of the Rules of Court, drawn up in 1874, under the Principal Act.

The method of striking out and adding names of plaintiffs is prescribed by Rule 13, *infra*.

This Rule is intended to supplement the previous one. Mr. Day in his preface† observes upon the danger of a mistake as to the proper person to institute an action. “A mistake involves an expensive defeat.” “Great hardship and difficulty” are “imposed upon the person really interested as plaintiff.”

Rule 3.

All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether

* 3rd Report, p. 9.

† PP. 4, 5.

jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

This is Rule 2 of Order XV. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is new, but it is the logical sequence of the principles introduced, with regard to the joinder of plaintiffs, by the 19th Section of the Common Law Procedure Act, 1860, and embodied in Rule 1 of this Order.

Rule 4.

It shall not be necessary that every defendant to any action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or a Judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in such action in which he may have no interest.

This Rule is a re-enactment of Rule 23 of the Principal Act.

It embodies a principle well known and recognised in Courts of Equity, where the practice is to bring before the Court all parties whose appearance is necessary, in order to enable it to do complete justice, a practice which will form a distinguishing feature of the new system of judicature. (See subsection (7) of section 24 of the Principal Act, and s. 13 of this Order).

Rule 5.

The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes.

This Rule is a re-enactment of the 16th Rule of the Principal Act.

See Order II., Rule 6, *supra*.

By s. 6 of the Summary Procedure on Bills of Exchange Act, 1855, (18 & 19 Vict., c. 67), "the holder of any bill of exchange or promissory note may, if he thinks fit, issue one writ of summons, according to that Act, against all or any member of the parties to such bill or note, and such writ of summons shall be the commencement of an action or actions against the parties therein named respectively, and all subsequent proceedings against such respective parties shall be in like manner, as far as

may be, as if separate writs of summons had been issued." It is quite optional with a plaintiff to avail himself of this provision or not; and while it, therefore, in no way fetters his rights against any of the parties, it enables him at the expense of one writ (the service of which, as against any of the parties, he may delay as he thinks fit), to lay the foundation of an action against all.*

The principle of this enactment is extended by this Rule to all actions *ex contractu*.

Rule 6.

Where in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action.

This Rule is a re-enactment of Rule 13 of the Principal Act.

"In such manner as hereinafter mentioned," *i.e.* by Rule 13 of this Order, —which see. It is apprehended that this Rule only applies to a "doubt" striking the mind of the plaintiff after he has commenced his action. If the "doubt" strikes his mind before the commencement of the action, Rule 3 ought to solve it.†

Rule 7.

Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the action; but the Court or a Judge may, at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition to or in lieu of the previously existing parties thereto.

This Rule is a re-enactment of Rule 14 of the Principal Act.

* Day's Common Law Procedure Acts, 1852, p. 386.

† It is to be observed that the present Rule was embodied in the Schedule to the Act of 1873, while Rule 3 was framed in 1874, which might account for any tautology.

See the 9th Rule of s. 42 of the Stat. 15 and 16 Vict., c. 86, cited under Rule 11, which, to some extent, embodies the principle of this Rule.

Rule 8.

Married women and infants may respectively sue as plaintiffs by their next friends, in the manner practised in the Court of Chancery before the passing of this Act; and infants may, in like manner, defend any action by their guardians appointed for that purpose. Married women may also, by the leave of the Court or a Judge, sue or defend without their husbands and without a next friend, on giving such security (if any) for costs as the Court or a Judge may require.

This Rule is a re-enactment of Rule 15 of the Principal Act.

It is now settled that all cases in which husband and wife sue together as co-plaintiffs in Chancery, are regarded as suits by the husband alone.* In general, therefore, where the Bill relates to *the separate property* of the wife, it is necessary that the Bill should be filed in the name of her next friend; otherwise the defendant may object. Where the wife sues by her next friend, the husband must still be a party, and it is usual to make him a defendant,† but a husband having no adverse interest to his wife may be made a co-plaintiff.‡

If a Bill in Chancery is filed on behalf of an infant, without a next friend, the defendant may move to have it dismissed with costs, to be paid by the solicitor. Although an infant has a guardian assigned him by the Court, or appointed by will, yet when the infant is plaintiff, the course is not to call the guardian by that name, but to call him the next friend. Where the infant is defendant, the guardian is so called. But where an infant is defendant, the Court will appoint a guardian *ad litem* to put in his defence for him and generally to act on his behalf in the conduct and management of the case. The solicitor to the Suitor's Fee Fund is the person generally appointed, but a co-defendant may be appointed if he has no adverse interest.

A married woman may be permitted to sue *in formâ pauperis* without a next friend.§ A peeress may be admitted to sue *in formâ pauperis*||

A married woman may apply without a next friend, where she has obtained a Protection Order under 20 and 21 Vict., c. 85, s. 21. (*Bate v. The Bank of England*, 4 K. and J., 564; *Re Rainsdon*, 4 Drew, 466.)

* *Wake v. Parker*, 2 Keen, 59, 70; *Davis v. Prout*, 7 Beav., 288, 290.

† *Wake v. Parker*, *ubi supra*; *Davis v. Prout*, *ubi supra*.

‡ *Beardmore v. Gregory*, 2 H. and M., 491; *Meadowcroft v. Campbell*, 13 Beav., 184.

§ *Ex parte Hakewell*, 5 D. M. and G., 116. *Re Foster*, 18 Beav., 525; *Crouch v. Waller*, 48 De G. and J., 43.

|| *Wellesley v. Wellesley*, 16 Sim. 1.

If her husband is out of the jurisdiction * or *cuiliter martius* a married person can sue without a next friend.

See further the Married Women's Property Act, 1870.

Rule 9.

Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested.

This Rule is a re-enactment of Rule 10 of the Principal Act.

The Rule is borrowed from the practice of the Court of Chancery. "It has long," says Mr. Daniel,† "been the established practice to allow a plaintiff to sue on behalf of himself and of all others of a numerous class of which he is one, and to make one of a numerous class the only defendant, as representing the others."

This proposition is very profusely illustrated by Mr. Daniel in the first and second sections of the fifth Chapter of his work on "Chancery Practice." The reader is referred to these sections, which deserve careful consideration.

Rule 10.

Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms, if any; and any party to an action may in such case apply by summons to a Judge for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner and verified on oath or otherwise, as the Judge may direct.

This Rule is a re-enactment of Rule 11 of the Principal Act.

By Order XII., Rule 12, *supra*, when partners are sued in the name of their firm, they must appear individually in their own names. All subsequent proceedings, however, are to continue in the name of the firm. One of several partners has no implied authority at Common Law to enter an appearance for the others.‡

See, now, as to disclosure of the names of partners, the Registration of Firms Act, 1875.

* See *Postgate v. Barnes*, 11 W.R. 356, 9 Jur. N. S., 459

† Daniel's Chancery Practice, p. 172.

‡ Archbold's Practice, p. 219.

Rule 11.

Subject to the provisions of the Act and these Rules, the provisions as to parties, contained in section 42 of 15 & 16 Victoria, Chapter 86, shall be in force as to actions in the High Court of Justice.

This is Rule 4 of Order XV. of the Rules of Court, drawn up in 1874, under the Principal Act.

The following is the enactment referred to :—

“ It shall not be competent to any defendant in any suit in the said Court* to take any objection for want of parties to such suit in any case to which the rules next hereinafter set forth extend ; and such rules shall be deemed and taken as part of the law and practice of the said Court and any law or practice of the said Court inconsistent therewith shall be and is hereby abrogated and annulled.

“ Rule 1. Any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person.

“ Rule 2. Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person.

“ Rule 3. Any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like decree.

“ Rule 4. Any one of several *cestuis que trustent* under any deed or instrument may, without serving any other of such *cestuis que trustent*, have a decree for the execution of the trusts of the deed or instrument.

“ Rule 5. In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.

“ Rule 6. Any executor, administrator, or trustee may obtain a decree against any one legatee, next of kin, or *cestuis que trustent* for the administration of the estate, or the execution of the trusts.

“ Rule 7. In all the above cases the Court, if it shall see fit, may require any other person or persons to be made a party or parties to the suit, and may, if it shall see fit, give the conduct of the suit to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

“ Rule 8. In all the above cases the persons who, according to the present practice of the Court, would be necessary parties to the suit, shall be served with notice of the Decree, and after such notice they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit, and they may by an order of course have liberty to attend the proceedings under the decree ; and any party so served may, within such time as shall in that behalf be prescribed by the General Order of the Lord Chancellor, apply to the Court to add to the decree.

* The Court of Chancery.

“Rule 9. In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but the Court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties.”

This section is restrospective.*

Rule 12.

Subject as last afcresaid, in all Probate actions rules as to parties, heretofore in use in the Court of Probate, shall continue to be in force.

This is Rule 5 of Order XV., of the Rules of Court, drawn up in 1874, under the Principal Act.

In an action in the Probate Court, the parties entitled to be plaintiffs are, primarily, the executor; failing him, the party entitled to the residue, or a legatee named in the will, or other party interested under the will, or the representatives of these persons.

Any party whose interest may be adversely affected by the will may be a defendant, and a possibility of interest is sufficient to entitle a party to appear in this character. Amongst the persons who may appear as defendants are:—

1. The widow and next of kin of the deceased, and all other persons entitled in distribution to his personal estate, in the event of his dying intestate, or their representatives.

2. A legatee named in the will, if his legacy has been omitted from the probate, or his representatives.

3. An executor or legatee named in any other testamentary instrument of the deceased, of prior date to the will in question, whose interest is adversely affected by the will, or their representatives.

4 and 5. When an administration has been previously granted, a creditor in possession of administration and a person in possession of administration under Section 73 of the Probate Act, 1857, as appointee of the Court, without having a beneficial interest in the estate of the deceased.

6. When the will relates to real as well as personal estate, the heir-at-law, devisee, or other persons pretending an interest in such real estate, are to be made defendants, unless the Court shall otherwise direct.

When an executor appears to the citation and propounds the will himself, he becomes nominally a defendant, but does all acts which usually devolve on the plaintiff, *e. g.* deliver the declaration, &c.†

See further as to parties in Probate actions, Rules 4, 5 and 6 of the Rules and Orders of the Court of Probate, and Coote and Tristram's Probate Practice, pp. 251-259.

As to “interveners,” see, also, Order XII., Rule 16, *supra*.

* *Fowler v. Bzylton*, 9 Hare, App. LXXVIII.

† *Brandreth v. Brandreth and Wife*; 2 Swabey and Tristram, 446.

Rule 13.

No action shall be defeated by reason of the mis-joinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined be struck out, and that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability without his own consent thereto. All parties whose names are so added as defendants shall be served with a summons or notice in manner herein-after mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice.

This Rule is a re-enactment of Rule 9 of the Principal Act.

See as to mis-joinder and non-joinder of plaintiffs and defendants, and the previous remedies therefor, the note to Rule 1, *supra*.

The first clause of this Rule is taken from section 19 of the Common Law Procedure Act, 1860 :—"The joinder of too many plaintiffs shall not be fatal"—extended so as to embrace the case of the joinder of too many defendants, also.

It is apprehended that the word "mis-joinder" is intended here to include non-joinder. By s. 49 of the Chancery Amendment Act, 1852, it is provided that "no suit in the Court of Chancery shall be dismissed by reason of the non-joinder of persons as plaintiffs therein."

Advantage cannot be taken after the 1st of November, 1875, by a defendant of non-joinder of a plaintiff in actions of tort, and of non-joinder of a defendant in actions *ex contractu*, by plea in abatement. By Order XIX., Rule 13, pleas in abatement are abolished.

The second clause of this Rule is founded upon sections 34-39 of the

Common Law Procedure Act, 1852. The principles underlying those sections have, however, been considerably extended.

The 34th and 35th sections of the Common Law Procedure Act, 1852, as to the mis-joinder or non-joinder of plaintiffs, and the 37th section of the same Act, as to the mis-joinder and non-joinder of defendants, made a distinction between applications to amend before, and applications to amend at, the trial. All such distinctions are swept away by the present Rule,* which applies to applications made "at any stage of the proceedings." Notices of objection to non-joinder, of course, fall to the ground with pleas in abatement. The present Rule substantially agrees with sections 34 and 35 of the Common Law Procedure Act, 1852, as to the necessity of obtaining the consent of the persons whose names are to be struck out or added, but it does not appear to be any longer necessary that the consent should be in any particular form.

"In manner hereinafter mentioned." See Rule 15 of this Order.

Defendants may be added or plaintiffs may be added or struck out, under certain conditions, in Equity.†

Rule 14.

Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a Judge at any time before trial by motion or summons, or at the trial of the action in a summary manner.

This is Rule 6 of Order XV. of the Rules of Court, drawn up in 1874, under the Principal Act.

"By motion" in Court, or "summons" at Chambers.

The application to amend should in general be made to a Judge at Chambers, by summons, calling upon the opposite party to show cause why the party applying should not have leave to amend.‡

"In a summary manner." Probably in the same manner as hitherto, i.e., the manner prescribed by s. 23 of the 3 and 4 Wm. IV., c. 42.§ The Court or Judge shall "cause the writ or other documents to be forthwith amended by some officer of the Court, or otherwise, in every part of the pleadings, which it may become necessary to amend."

Rule 15.

Where a defendant is added, unless otherwise ordered by the Court or Judge, the plaintiff shall file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ, or notice in lieu of service thereof, in the same manner as original defendants are served.

* See, however, the next Rule.

† See Morgan and Chute's Chancery Acts and Orders, No. 215.

‡ Archbold's Practice, p. 1,559.

§ See s. 35 of the Common Law Procedure Act, 1852.

This is Rule 7 of Order XV. of the Rules of Court, drawn up in 1874, under the Principal Act.

No provision is made for the case of a plaintiff being added. Section 36 of the Common Law Procedure Act, 1852, provides that the plaintiff is to be at liberty in such case to amend the writ and other proceedings by adding the new names; and the defendant is to be at liberty to plead *de novo*.

The practice under the Common Law Procedure Act, 1852, in the case of the addition of the names of new defendants upon notice or plea of nonjoinder is given in s. 38 of that Act:—

“The plaintiff shall be at liberty, without any order, to amend the writ of summons and the declaration by adding the name or names of the person or persons named in such plea in abatement as joint contractors, and to serve the amended writ upon the person or persons named in such plea in abatement, and to proceed against the original defendant or defendants and the person or persons so named in such plea in abatement; provided that the date of such amendment shall, as between the person or persons so named in such plea in abatement and the plaintiff, be considered, for all purposes, as the commencement of the action.”

Rule 16.

If a statement of claim has been delivered previously to such defendant being added, the same shall, unless otherwise ordered by the Court or Judge, be amended in such manner as the making such new defendant a party shall render desirable, and a copy of such amended statement of claim shall be delivered to such new defendant at the time when he is served with the writ of summons or notice, or afterwards, within four days after his appearance.

This is Rule 8 of Order XV. of the Rules of Court, drawn up in 1874, under the Principal Act.

As to the amended declaration (statement of claim), see the provisions of s. 38 of the Common Law Procedure Act, 1852, cited in the note to the last Rule.

Section 60 of that Act furnishes a form of the commencement of the amended declaration (now amended statement of claim):—

“A.B., by E.F., his attorney [or in his own proper person, &c.] sues C.D. and G.H., which said G.H. has heretofore pleaded in abatement the nonjoinder of the said G.H.” Of course the insertion of the words “which said G.H. has heretofore pleaded in abatement the nonjoinder of the said G.H.,” will after the 1st of Nov., 1875, be unnecessary, as pleas in abatement are abolished by Order XIX., Rule 13.

Rule 17.

Where a defendant is or claims to be entitled to contri-

bution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appears to the Court or a Judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the Court or a Judge may, on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined.

This Rule is a re-enactment of Rule 12 of the Principal Act, with the omission of the words "in such manner and form as may be prescribed by Rules of Court," after "such last-mentioned person."

As to giving notice to the third person, see Rule 19 of this Order, *infra*.

See, as to the subject-matter of this Rule, the Principal Act, s. 24, subsection (3). This Rule is copied, almost *verbatim*, from the First Report of the Judicature Commission, who recommended its adoption.

The following Rules 18-20 introduce the new practice on this subject, and appear to be carefully framed, with a view to carrying out the recommendation of the Judicature Commission in all its details.

Rule 18.

Where a defendant claims to be entitled to contribution, indemnity, or other remedy or relief over against any person not a party to the action, he may, by leave of the Court or a Judge, issue a notice to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer, and served on such person according to the rules relating to the service of writs of summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a Judge, be served within the time limited for delivering his statement of defence. Such notice may be in the form or to the effect of the Form No. 1 in Appendix (B.) hereto, with such variations as circumstances may require, and therewith shall be served a copy of the statement of claim, or if there

be no statement of claim, then a copy of the writ of summons in the action.

This is Rule 9 of Order XV., of the Rules of Court, drawn up in 1874, under the Principal Act. "Appendix (B)" being substituted for "Schedule (B)," so as to bring the Rule into harmony with the present Act.

See as to the course which a third person served with notice ought to take, Rule 20 of this Order, *infra*.

Rule 19.

When, under Rule 12 of the Schedule to the said Act, it is made to appear to the Court or a Judge, at any time before or at the trial, that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff and the defendant and any other person, or between any or either of them, the Court or a Judge, before or at the time of making the order for having such question determined, shall direct such notice to be given by the plaintiff at such time and to such person, and in such manner as may be thought proper, and, if made at the trial, the Judge may postpone such trial as he may think fit.

This is Rule 10 of Order XV., of the Rules of Court, drawn up in 1874, under the Principal Act, "Rule 17 of this Order" being substituted for "Rule 12 of the Schedule to this Act," in order to adapt the Rule to the present Act.

Rule 20.

If a person not a party to the action, who is served as mentioned in Rule 18, desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance in the action within eight days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise. Provided always, that a person so served and failing to appear within the said period of eight days, may apply to

the Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or a Judge shall think fit.

This is Rule 11 of Order XV., of the Rules of Court, drawn up in 1874, under the Principal Act, "Rule 18" being substituted for "Rule 9," in order to adapt the Rule to the present Act.

Rule 21.

If a person not a party to the action served under these Rules appears pursuant to the notice, the party giving the notice may apply to the Court or a Judge for directions as to the mode of having the question in the action determined; and the Court or Judge, upon the hearing of such application, may, if it shall appear desirable so to do, give the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered, or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken, and give such directions, as to the Court or a Judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the person so served shall be bound or made liable by the decision of the question.

This is Rule 12 of Order XV., of the Rules of Court, drawn up in 1874, under the Principal Act. (The long sentence is rather involved.)

ORDER XVII.

JOINDER OF CAUSES OF ACTION.

Rule 1.

Subject to the following Rules, the plaintiff may unite in the same action and in the same statement of claim several causes of action, but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order separate trials of any of such causes of action to be had, or

may make such other order as may be necessary or expedient for the separate disposal thereof.

This Rule is a re-enactment of Rule 22, of the Principal Act, the words, "subject to the following Rules," being substituted at the commencement of the Rule, for "subject to any Rules of Court."

The Rule is taken from s. 41 of the Common Law Procedure Act, 1852, which, like the present Rule, is permissive only, not compulsory.

When re-enacting substantially the provisions of the 41st section by this Rule, the legislature has taken care to omit two important qualifications contained in that section, viz :—that the causes of action, which are joined, must be "against the same parties and in the same rights."*

Rule 2.

No cause of action shall, unless by leave of the Court or a Judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held.

This is Rule 1 of Order XVI. of the Rules of Court, drawn up in 1874 under the Principal Act.

By section 41 of the Common Law Procedure Act, 1852, it is expressly provided that the permission thereby given to join several causes of action shall not extend to replevin or to ejectment. The exception as to replevin would seem to be repealed by this Rule.

"Claims in respect of mesne profits." The claimant in ejectment may, under s. 214 of the Common Law Procedure Act, 1852, after proof of his right to recover possession of the premises mentioned in the writ in ejectment, go into evidence of mesne profits, whether the defendants appear on the trial of ejectment or not. Under that enactment it is unnecessary to state anything, either in the writ or issue, in order to entitle the plaintiff in ejectment to recover mesne profits.†

It is to be observed that the causes of action, which may be joined with ejectment in relation to arrears of rent and damages for breach of contract, must relate to the *same premises* as those, the possession of which is sought to be recovered.

Rule 3.

Claims by a trustee in bankruptcy as such, shall not, unless by leave of the Court or a Judge, be joined with any claim by him in any other capacity.

* The wide field opened up for plaintiffs by the last Order would, in itself, be sufficient to account for this omission.

† *Smith v. Tett*, 23 L. J. Ex. 93; 9 Ex. 307

This is Rule 2 of Order XVI. of the Rules of Court, drawn up in 1874, under the Principal Act.

The words "provided the claims are in the same rights," which occur in s. 41 of the Common Law Procedure Act, 1852, being omitted in Rule 1, *supra*, it becomes necessary to specify the cases in which causes of action accruing in different rights cannot be joined and the present Rule specifies one of them.

It is not necessary for a trustee in bankruptcy to describe himself as such in the writ of summons, when suing in that capacity. By Rule 5 of Trinity Term, 1853, in actions by assignees in bankruptcy, the character, in which they are stated in the record, to sue or be sued, is not to be considered as in issue, unless specially denied.

Rule 4.

Claims by or against husband and wife may be joined with claims by or against either of them separately.

This is Rule 3 of Order XVI., of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is in accordance with Rule 1—claims in *different* rights may be joined.

See as to actions by married women without their husbands or next friend, Order XVI., Rule 8, *supra*.

This enactment is an extension of the principle contained in section 40 of the Common Law Procedure Act, 1852:—"In any action brought by a man and his wife for injury done to the wife in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right." As pointed out by Mr. Day,* counts for goods sold and delivered, and money lent by the husband, might be joined under the latter enactment to the joint cause of action in respect of injury done to the wife, the terms of it are so wide.

Rule 5.

Claims by or against an executor or administrator as such may be joined with claims by or against him personally; provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator.

This is Rule 4 of Order XVI. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule introduces an important alteration in the law. It has been expressly laid down† that it is not competent to a plaintiff to join in the

* Common Law Procedure Acts, p. 79.

† 2 Wms. Saunders, 117, f. (2); 2 Wms. Exors., 6th edn., p. 1729.

same action, claims by him *personally* with claims by him *as an executor or administrator*.

Rule 6.

Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant.

This is Rule 5 of Order XVI. of the Rules of Court, drawn up in 1874, under the Principal Act.

One of the qualifications—"against the same defendant"—mentioned in section 41 of the Common Law Procedure Act, 1852, is introduced in this case.

Rule 7.

The last three preceding Rules shall be subject to Rule 1 of this Order, and to the Rules hereinafter contained.

This is Rule 6 of Order XV., of the Rules of Court, drawn up in 1874, under the Principal Act, "Rule I of this Order" being substituted for "Rule 22 in the schedule to the Act," in order to adapt the Rule to the present Act.

This is rather an extraordinary Rule. Rule 1 is stated to be "subject to the following Rules," which include the "three preceding Rules" referred to in the present Rule, while "the three preceding Rules" are declared by the present Rule to be "subject to Rule 1!" The meaning probably of "subject to Rule 1" is, that a Court or a Judge may, in any of the three last cases, "order separate trials" (see Rule 1)—an interpretation which is confirmed by the words, "subject to the Rules hereinafter contained," these Rules setting out the *modus operandi* by which the defendant may counteract the effect of the principles laid down in Rules 4, 5, and 9. (See a similar see-saw, Order XXXVI., Rules 2, 4, and 6.)

Rule 8.

Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of in one action, may at any time apply to the Court or a Judge for an order confining the action to such of the causes of action as may be conveniently disposed of in one proceeding.

This is Rule 7 of Order XVI. of the Rules of Court, drawn up, in 1874, under the Principal Act.

This and the next Rule supply the *modus operandi* for working out the proviso attached to Rule 1, "but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order separate trials of any such causes

of action to be had, or to make any such other order as may be necessary or expedient for the separate disposal thereof."

Rule 9.

If, on the hearing of such application as in the last preceding Rule mentioned, it shall appear to the Court or a Judge that the causes of action are such as cannot all be conveniently disposed of in one action, the Court or a Judge may order any of such causes of action to be excluded, and may direct the statement of claim, or, if no statement of claim has been delivered, the copy of the writ of summons, and the indorsement of claim on the writ of summons, to be amended accordingly, and may make such order as to costs as may be just.

This is Rule 8 of Order XVI. of the Rules of Court, drawn up in 1874 under the Principal Act.

See note to Rule 8.

ORDER XVIII.

ACTIONS BY AND AGAINST LUNATICS AND PERSONS OF
UNSOUND MIND.

In all cases in which lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the Act have sued as plaintiffs or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend in manner practised in the Court of Chancery before the passing of the said Act, and may in like manner defend any action by their committees or guardians appointed for that purpose.

This is Order XVII. of the Rules of Court, drawn up in 1874 under the Principal Act.

As to service of the writ of summons, in the case of lunatics and persons of unsound mind, not so found by inquisition, see Order IX., Rule 5, *supra*, and the note thereto.

This Order places lunatics and persons of unsound mind, not so found by inquisition, on the same footing, *mutatis mutandis*, as that on which

infants are placed, with respect to suing and being sued, under Order XVI., Rule 8.

Suits on behalf of a lunatic are usually instituted, in the Court of Chancery, in the name of the lunatic; but as he is a person incapable at law of taking any steps on his own account, he sues by the committee of his estate, if any, or if none, by his next friend, who is responsible for the conduct of the suit. The committee or next friend must be joined as a co-plaintiff or a defendant. Where the committee of a lunatic filed a Bill on behalf of the lunatic, without joining himself as co-plaintiff, the case was directed to stand over, with liberty to amend, by making the committee co-plaintiff.*

If the person exhibiting a Bill appear upon the face of it to be a lunatic, and no next friend or committee is named in the Bill, the defendant may demur;† but if the incapacity does not appear on the face of the Bill, the defendant must take advantage of it by plea. A committee previously to instituting a suit on behalf of the lunatic, should obtain the sanction of the Lord Chancellor or of the (existing ‡) Lords Justices. In order to obtain such sanction a state of facts showing the propriety of the suit should be laid before the Master in Lunacy, and a report obtained from him approving of the suit, which report must be confirmed by the Lord Chancellor or Lords Justices.

Persons of unsound mind not so found by inquisition are permitted to sue by their next friend; and it seems that if a Bill has been filed in the name of a plaintiff who, at the time of filing it is in a state of mental incapacity, it may, on motion, be taken off the file.§

A lunatic may be made a defendant to a suit, but he must defend by the committee of his estate, who, as well as the lunatic, is a necessary party to the suit. No order is required to enable the committee to defend; but the committee must obtain the sanction of the Lord Chancellor, or of the (existing) Lords Justices, before defending, in the same manner or before instituting a suit. Usually, the lunatic and his committee make a joint defence to the suit; but if it happens that a lunatic has no committee, and the committee is plaintiff, or has an adverse interest, an order should be obtained, on motion of course, or a petition of course at the Rolls, supported by affidavit, appointing a *guardian* to defend the suit." ||

Persons of unsound mind, not so found by inquisition, defend by guardian, who will be appointed on an application by motion of course, or on petition of course in the Rolls, in the name of the person of unsound mind. The application must be supported by affidavits proving the mental incapacity of the defendant,¶ the fitness of the proposed guardian, and that he has no adverse interest.**

An appearance should be entered on the defendant's behalf, and an order obtained for a guardian. If such order is not obtained, the plaintiff must apply for an order by motion, notice of which should be served pursuant

* *Woolfryes v. Woolfreys*, Rolls, Feb. 7, 1824.

† Mitf., 153.

‡ See s. 7. of the present Act.

§ *Wartualy v. Wartualy*, Jac., 377; *Blake v. Smith*, Younge, 596.

|| Mitf., 104; *Snell v. Hyat*, 1 Dick., 287; *Lady Hartland v. Atcherley*, 7 Bean, 53; *Watts v. McKenzie*, 3 M. and G., 363.

¶ *Simmons v. Bates*, 20 L. J., 270.

** *Piddoche v. Smith*, 9 Haro., 395.

to Order VII., Rule 3 of the Consolidated Orders. It is usual to appoint the solicitor to the Suitors' Fund to be the guardian.

ORDER XIX.

PLEADING GENERALLY.

Rule 1.

The following rules of pleading shall be substituted for those heretofore used in the High Court of Chancery and in the Courts of Common Law, Admiralty, and Probate.

This rule is a re-enactment of the first part of Rule 18 of the Principal Act.

No mention, it will be perceived, is made of the Court for Divorce and Matrimonial Causes; by Order LXII. it is provided that "nothing in these Rules shall affect the Practice or Procedure" in that Court.

Rule 2.

Unless the defendant in an action at the time of his appearance shall state that he does not require the delivery of a statement of complaint, the plaintiff shall within such time and in such manner as hereinafter prescribed, deliver to the defendant after his appearance a statement of his complaint and of the relief or remedy to which he claims to be entitled. The defendant shall within such time and in such manner as hereinafter prescribed deliver to the plaintiff a statement of his defence, set-off, or counter-claim (if any), and the plaintiff shall in like manner deliver a statement of his reply (if any) to such defence, set-off, or counter-claim. Such statements shall be as brief as the nature of the case will admit, and the Court in adjusting the costs of the action shall inquire, at the instance of any party, into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same.

This rule is a re-enactment of the second part of Rule 18 of the Principal Act, "in such manner as hereinafter prescribed," being substituted for "in such manner as shall be prescribed by Rules of Court."

The form of Memorandum of Appearance given in Appendix (A),

Part I, No. 6, contains the following intimation at the end of it:—"The said defendant (requires, or does not require) a statement of complaint to be filed and delivered." "Within such time and in such manner as herein-after prescribed," namely, in Orders XXI. and XXII., *infra*.

By Order II., Rule 2, the use of prolix writs and indorsements of claim is to be visited with costs, in the same manner as prolix statements of claim and of defence, reply, set-off, and counter-claim, under this Rule. The Judicature Commission adduced prolixity as the cardinal sin of Chancery pleadings:—"Equity pleadings commonly take the form of a *prolix* narrative of the facts relied upon by the party, with copies of extracts of deeds, correspondence and other documents and other particulars of evidence set forth at needless length,"* The plaintiff, whose equity draughtsman indulges a time-honoured taste for a "prolix" narrative, will, under this Rule, be mulcted in "the costs occasioned by such prolixity."

Rule 3.

A defendant in an action may set-off, or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

This rule is a re-enactment of Rule 20 of the Principal Act. the words "in an action" being inserted after the words "a defendant," at the commencement of the rule.

This rule is copied (almost *verbatim*) from the following recommendation of the Judicature Commission:—"We think that a defendant, having a right or claim against a plaintiff with reference to the subject-matter of the suit, or arising out of the same transaction, which at present he cannot enforce without a separate or cross action or suit, should be at liberty to bring forward such right or claim in his answer, which in that case should have the same effect as if it were a declaration in a cross action or suit, so as to enable the Court or a Judge to pronounce a final judgment between the parties with respect both to the original and the cross demand. But a Judge should be empowered, on application by the plaintiff before

* First Report of the Judicature Commission, p. 11.

trial, to refuse permission to allow such cross right or claim to be brought forward, if he shall be of opinion that it cannot conveniently be adjudicated upon in the case to be tried.”*

The principle of this rule is also embodied in subsection (3) of section 24 of the Principal Act :—“The said Courts respectively and every Judge thereof shall have power to grant to any defendant in respect of any equitable estate or right or other matter in equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff as the said Courts respectively, or any Judge thereof, might have granted *in any suit instituted for that purpose by the same defendant against the same plaintiff.*”

The framer of this subsection evidently had present to his mind the practice in equity of filing cross bills. It frequently happens that a complete decree cannot be made without a cross bill to bring the whole matter in dispute before the Court. A cross bill will even be directed to be filed by the Court itself at the hearing of the original suit, in order to bring the rights of all the parties fully and properly before it.

The object of the 3rd subsection of section 24 of the Principal Act and of the present Rule, is to give the parties all the advantages which would result from the filing of a cross bill, without involving the trouble and expense of filing it.

See further, Rule 10, *infra*, as to set-off and counter-claim.

Rule 4.

Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary. Forms similar to those in Appendix (C) hereto may be used.

This is Rule 1 of Order XVIII. of the Rules of Court, drawn up in 1874 under the Principal Act, with the addition of the words at the end, “Forms similar to those in Appendix (C) hereto may be used.” With the exception of forms 28 and 29 of Appendix (C) to this Act, which are copied from forms 1 and 2 of Schedule (C) to the Rules of Court of 1874, all the forms in Appendix (C) to this Act are new.

This rule is copied from s. 10 of the Chancery Amendment Act, 1852.† and assimilates the practice in the Common Law Divisions of the High Court to that of the Court of Chancery :—

“Every Bill of Complaint shall contain as concisely as may be a

* First Report of the Judicature Commission, pp. 11, 12.

† 15 and 16 Vict., c. 86.

narrative of the material facts, matters and circumstances on which the plaintiff relies, such narrative being divided into paragraphs numbered consecutively, and each paragraph containing, as nearly as may be, a separate and distinct statement or allegation.

"Expressed in figures and not in words." This is taken from Order IX., Rule 3, of the Consolidated Orders of the Court of Chancery.

"Signature of counsel shall not be necessary." Here the Common Law, not the Chancery Practice, is followed. By s. 85 of the Common Law Procedure Act it is provided that "the signature of counsel shall not be required to any pleading." By Order VIII, Rule 1, of the Consolidated Orders of the Court of Chancery it is, on the other hand, provided that "the Clerks of Records and Writs shall not file any bill, exceptions, demurrer, plea, answer, or disclaimer, unless the same be signed by counsel"—a rule as old as the time of Henry V. A Bill in Chancery not signed by counsel is demurrable.*

Rule 5.

Every pleading which shall contain less than three folios of seventy-two words each (every figure being counted as one word) may be either printed or written, or partly printed and partly written, and every other pleading, not being a petition or summons, shall be printed.

This is Rule 2 of Order XVIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

As to printing, see Order LVI., Rule 2.

By Order V., Rule 5, "writs of summons shall be written or printed, or partly written and partly printed."

The introduction of printing into the new system is borrowed from the practice of the Court of Chancery, as, at Common Law, the pleadings are invariably written. The question of *length* is, of course, an important element in the case. Every pleading containing more than three folios (except a petition or summons) *must*, under the new practice, be printed. This will, probably, add considerably to the *expense* of proceedings in the Common Law Divisions.

The rule as to printing was not so stringent even in the Court of Chancery. The Bill and Answer had to be printed, irrespective of the length; but interrogatories were not required to be printed, nor, it is conceived, pleas, except when a joint plea and answer were put in.

Rule 6.

Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party

* *Kirklev v. Burton*, 3 Madd., 378.

who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer.

This is Rule 3 of Order XVIII. of the Rules of Court drawn up in 1874 under the Principal Act.

Where the plaintiff "sues by attorney, and where the defendant has appeared by attorney, all notices, summonses, orders, rules, pleadings, and other proceedings must be delivered to the attorney (or his agent if it be a county cause), and not to the party himself, so long as the attorney's authority continues."* Where a party sues or defends in person, the service must be made on him.†

"The manner now in use." When the service is on an attorney, a copy of the proceedings should be left at his office with some person resident at or belonging to the same.‡ Service at the chambers of an attorney on his laundress will not suffice, unless she act as his servant, and the affidavit of service state that fact, and the deponent's belief of it. Putting a copy of a rule under the door of the attorney's chambers or place of business,§ or into a letter box,|| unless there is a notice requesting papers, &c., to be so left, is insufficient.**

"The manner now in use" of delivering pleadings where the party sues and defends in person is prescribed by Rule 166 of the Reg. Gen. Hil. T., 1833. Pleadings must be delivered at the "address of service." The rule does not state, however, *to whom* the pleadings may be delivered. Delivery to the party's mother,†† sister,‡‡ or female relation stopping at his residence§§ is sufficient. A mode of delivery, which would not suffice in the case of delivery to the attorney, will not suffice where the party sues or defends in person.|||

"Filed." This is the course prescribed by section 28 of the Common Law Procedure Act, 1852, in the case of a declaration in default of appearance.

All pleadings in the Court of Chancery, whether bills, answers, pleas, demurrers, or replications, are filed with the Clerks of Records and Writs; but by Rule 9 of Order III. of the Consolidated Orders of that Court, "where any solicitor or party causes an answer, demurrer, pleas, or replication to be filed, he shall, *on the same day*, give notice thereof to the solicitor of the adverse party, or to the adverse party himself, if he acts in person."

Rule 7.

Every pleading in an action shall be delivered between parties, and shall be marked on the face with the date of

* *Tashburn v. Havelock*, Barnes, 306. † Archbald's Practice, 165, 166.

‡ *Kent v. Jones*, 3 Dowl., 210. *Smith v. Spurr*, 2 Dowl., 281.

§ *Stratton v. Hawkes*, 3 Dowl., 25.

|| *Braham v. Sawyer*, 1 D. and L., 466.

** *Warren v. Thompson*, 2 Dowl., N.S., 224. †† *Warren v. Smith*, 2 Dowl., 216.

‡‡ *Archer v. Evans*, 1 Dowl., N.S., 861.

§§ *Weedon v. Lipman*, 9 Dowl., 111. ||| Archbold's Practice, p. 167.

the day on which it is delivered, and with the reference to the letter and number of the action, the Division to which and the Judge (if any) to whom the action is assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor.

This is Rule 4 of Order XVIII. of the Rules of Court drawn up in 1874 under the Principal Act.

"The date of the day." The date of the filing of every pleading must be written or printed on the first page of the pleading, in the Court of Chancery, and must also be entered in the books of the Clerks of Records and Writs.* The letter and the number by which the cause is distinguished in the cause books must also be written or stamped on the first page.† The symbols used are placed on the first page either at the top or on the left hand margin, near the top. The pleading also is intituled of the cause, and states whether it is an answer, plea, &c. See the forms given by Mr. Daniel, 154, 531, &c., and the forms in the Appendix (C), which it will be seen are, *mutatis mutandis*, a copy of the forms in Chancery.

The name and place of business of the solicitor or party filing the pleading, and his address for service, must, moreover, be indorsed on the pleading.

Rule 8.

Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. And the same rule shall apply to any counter-claim made, or relief claimed by the defendant, in his statement of defence. If the plaintiff's claim be for discovery only, the statement of claim shall show it.

This is Rule 5 of Order XVIII. of the Rules of Court drawn up in 1875 under the Principal Act.

The first clause of this Rule is copied from s. 10 of the Chancery Amendment Act, 1852:—"Every Bill of Complaint shall pray specifically for the relief which the plaintiff may conceive himself entitled to, and also for general relief." Before that enactment it was not absolutely necessary for the plaintiff in a Court of Chancery to "pray specifically for relief," praying for "general relief" was sufficient.‡

* Order I, Rules 45, 47, and 48.

† Thus "A., No. 50." See the Forms in Appendix (C).

‡ *Cook v. Martyn*, 2 Atk. 3; *Grimes v. French*, 2 Atk. 141; and see *Partridge v. Haycroft*, 11 Ves. 574.

“Discovery.”—“Every Bill may be a Bill of discovery.” (Daniel’s Chancery Practice, 1408.) A Bill of discovery, however, in a Court of Chancery is commonly used in aid of the jurisdiction of some other Court. Of course it will be no longer necessary in aid of an action-at-law.

See further as to discovery, Order XXXI. *infra*.

Rule 9.

Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counter-claim founded upon separate and distinct facts.

This is Rule 6 of Order XVIII. of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule would seem to modify, if not to abrogate the rule of equity, that two or more distinct subjects cannot be embraced in the same suit, the offence against which was termed “multifariousness,” and rendered a Bill liable to demurrer.*

Rule 10.

Where any defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim, he shall, in his statement of defence, state specifically that he does so by way of set-off or counter-claim.

This is Rule 7 of Order XXIII. of the Rules of Court drawn up in 1874 under the Principal Act.

Under Rule 3, a set-off or counter-claim is to have the same effect as a statement of claim in a cross action, and it is therefore very important to the plaintiff that he should know positively what he is called upon to meet.

Rule 11.

If either party wishes to deny the right of any other party to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically.

* See Daniel’s Chancery Practice, p. 283.

This is Rule 8 of Order XVIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

By Rule 5 of the Reg. Gen. Trin., T. 1853, it is provided that in all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered in issue, *unless specially denied*. Under the old Common Law practice it was not necessary to state the character in which the executor, &c., sued or was sued. By Order III., Rule 4, if the plaintiff sues or the defendant sued is in a representative capacity, the indorsement of claim on the writ of summons is to show in what capacity the plaintiff sues or the defendant is sued. By Order XVI. where there are numerous parties having the same interest, one or more of the parties may sue or be sued, or defend on behalf of all the parties so interested. The question of suing or being sued in a representative capacity, therefore, is of more importance under the new than under the old practice.

As to the "alleged constitution of a partnership's firm," see Order VII., Rule 2; Order IX., Rule 6; and Order XVI., Rule 10.

Rule 12.

In Probate actions where the plaintiff disputes the interest of the defendant, he shall allege in his statement of claim that he denies the defendant's interest.

This is Rule 9 of Order XVIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

"Interest causes" in the Court of Probate are administration suits where the right of a person applying for probate is contested on the ground of his having no interest in the estate of the deceased, either by reason of his not being related to the deceased at all, or by reason of his not being related to him in so near a degree as to entitle him in distribution to a share in the estate. These suits are conducted by declaration and plea.

By Rule 61 of the Rules of the Court of Probate in contentious business it is provided that "in interest causes each party shall be at liberty to deny the interest of the other."

Rule 13.

No plea or defence shall be pleaded in abatement.

This is Rule 10 of Order XVIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

The Rule abolishes a class of pleas which, as pointed out by Dr. Broom,* "have been discouraged in modern times, as exhibiting a tendency on the part of the defendant, to evade by technical objections, the trial of the matter alleged against him."

Rule 14.

No new assignment shall hereafter be necessary or

* Commentaries on the Common Law, 171 edn., p. 1869. *Broadbent v. Ledward*, 11 Ad. and E. 209.

used. But everything which has heretofore been alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim.

This is Rule 11 of Order XVIII. of the Rules of Court drawn up in 1874 under the Principal Act.

The Rule abolishes a form of replication to which the plaintiff was obliged to resort to correct mistakes caused by the generality of the declaration, a quality which it derived from its adherence to the tenor of those simple and abstract formulæ—original writs.*

Rule 15.

No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession. And he may, nevertheless, rely upon any ground of defence which he can prove, except as hereinbefore mentioned.

This is Rule 12 of Order XVIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

Under s. 178 of the Common Law Procedure Act, there were no pleadings in ejectment. The consequence of this was that an equitable defence could not be set up in ejectment under s. 83 of the Common Law Procedure Act, 1854. A defendant who had only an equitable interest in the land, for the recovery of which the action was brought, could not invoke the assistance of a Court of Law.† The defendant was obliged to resort to the Court of Chancery to enforce by injunction his rights. Where a tenant, *e.g.*, had contracted to purchase from the landlord the property of which he was in occupation, if the landlord took proceedings in ejectment, the tenant had still to resort to the Court of Chancery for an injunction to stay proceedings.

This extraordinary state of things is happily amended by the present Rule.

Rule 16.

Nothing in these Rules contained shall affect the right of any defendant to plead not guilty by statute. And

* Stephen on Pleading, 6th edn., p. 187. † *Neave v. Avery*, 16 C.B., 328.

every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had, but if the defendant so plead, he shall not plead any other defence without the leave of the Court or a Judge.

This is Rule 13 of Order XVIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

The plea of "not guilty" by statute, puts in issue not only the defences peculiar to the Statute, but also all that would have arisen at Common Law.*

By Reg. Gen. Trin. T., 1853, Rule 21, the defendant who pleads this plea must insert in the margin of the plea, the words "by statute," together with the year of the reign, and the chapter and section of the Act, otherwise the plea shall be taken not to have been pleaded by virtue of any Act of Parliament.

Rule 17.

Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition.

This is Rule 14 of Order XVIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

The principle contained in this rule is well recognised at the Common Law. "A plea in denial," observe the authors of "*Precedents of Pleading*," † "admits the truth of all the allegations in the declaration which are not denied by it, provided they are material, and might be denied, for it is an essential principle of pleading that whatever is not denied is admitted, and each plea is to be considered by itself, as if it were the only one on the record.‡

In the Court of Chancery, also, "the Bill, so far as it is not contradicted by the plea is," Lord Redesdale observes, "taken for true."

Great indulgence has always been shown by the Court of Chancery to infants and lunatics, who are regarded as peculiarly under its care.§

Rule 18.

Each party in any pleading must allege all such facts

* *Ross v. Clifton*, 11 A and E. 631.

† Bullen and Leake's "*Precedents of Pleading*," p. 436, 3rd edn.

‡ See *Jones v. Brown*, 1 Bing., N. C. 484; *Noel v. Boyd*, 4 Dowl. 415; *Saunderson v. Collman*, 4 M. & G. 209, 225.

§ Mitford on Pleading, 352; see *Id.*, 390.

not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as, for instance, fraud, or that any claim has been barred by the Statute of Limitations, or has been released.

This is Rule 15 of Order XVIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule appears to mean that a plaintiff will not at the trial be permitted to spring fraud or the Statute of Limitations upon the opposite party, unless in his pleadings he has specially pleaded it. The Statutes of Limitations must, under the old Common Law practice, have been specially pleaded, and by Reg. Gen. Trin. T., 1853, fraud must have been specially pleaded.

Rule 19.

No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim, or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

This is Rule 16 of Order XVIII. of Rules of Court, drawn up in 1874, under the Principal Act, with the addition of the words, "not being a petition or summons," after "no pleadings."

This Rule preserves the well known principle, that there must be no "*departure*" in pleading.

Lord Coke defines it thus:—* "A departure in pleading is said to be when the second plea containeth matter not pursuant to his former, and which fortifieth not the same, and therefore it is called *decessus*, because he departeth from his former plea."

"A departure," Mr. Serjeant Stephen points out,† "obviously can never take place till the replication."

Rule 20.

It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim, or for a plaintiff in his reply to deny generally the facts alleged in a defence by way of counter-

* Co. Litt. 304a.

† Stephen's Pl., 328. See instances of departures, *Hickman v. Walker*, Willes, 27; *Roberts v. Mariett*, 2 Saund, 188.

claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth.

This is Rule 17 of Order XVIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule seems to make pleading strictly "special" in all cases, and to do away with *the general issue*.

"Whereas," observe the authors of "Precedents Pleading," any defence is admissible under the general issue, it is still clearly the interest of the defendant to plead it in that form. By this means he may avoid disclosing his particular ground of defence; he will gain the advantage of throwing the greatest burthen of proof on his adversary, and *he may avail himself* not only of the particular defence he proposes to rely on, but also of *any other ground which may arise at the trial*, and which falls within the scope of the general issue."

Rule 21.

Subject to the last preceding rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted.

This is Rule 18 of Order XVIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

The first part of this Rule is taken from s. 79 of the Common Law Procedure Act, 1852. "Either party may plead in answer to the plea or subsequent pleadings of his adversary, that he joins issue thereon."

The 79th section proceeds as follows:—"Such forms of joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent pleadings, and an issue thereon."

Dr. Stephen* points out that "in the rules of pleading given by the Schedule annexed to the Jurisdiction Act, 1873, no pleadings beyond the reply are mentioned," and that "under the system prior to that Act, there was recognised a *rejoinder* on the part of the defendant to the replication, a *surrejoinder* from the plaintiff, a *rebutter* by the defendant, and a *surrebutter* on the part of the plaintiff."

The present Rule, however, restores the old practice, for it speaks of "*pleadings subsequent to reply*."

By Order XXIV, Rule 2, however, no pleading subsequent to the reply can be pleaded without leave of the Court or a Judge.

* P. 461 in (a).

† Stephen's Comm., Vol. 3, p. 507, n. (x), 7th edn. (1874).

Rule 22.

When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And so when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given.

This is Rule 19 of Order XVIII. of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule is taken from Order XV., Rule 2, of the Consolidated Orders of the Court of Chancery. The first clause of the Rule stands thus in the Chancery Order:—"When a defendant denies a fact (*sic*) he must traverse or deny directly, and not by way of *negative pregnant*." The illustration which follows is copied *verbatim*. The last clause of the Rule is thus expressed in the Chancery Order:—"And so where a fact is alleged, with divers circumstances, the defendant must not deny or *traverse* it *literally*, as it is alleged in the Bill, but must answer the point of substance positively and certainly." *

Rule 23.

When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise.

This is Rule 20 of Order XVIII. of the Rules of Court, drawn up in 1874 under the Principal Act.

The general issues, *non assumpsit*, and *non est factum* operated only as a "denial of the making of the contract in fact,†" and matters in confession and avoidance, and which showed the transaction to be void or voidable in point of law had to be specially pleaded, *e.g.*, release, infancy, coverture. But it was not necessary specially to plead the Statute of Frauds, as if the alleged contract did not satisfy the requirements of that

* This Order is as old as 1661.

† Reg. Gen., Trin. T., 1863, Rule 6.

statute, there was no contract at all in fact. Practically, therefore, a defence in matter of law (though not by way of confession or avoidance) was admissible under the general issue. It will not in future be admissible under the "bare denial of the contract" to be substituted for the general issue, *non assumpsit* and *non est factum*.

Rule 24.

Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

This is Rule 21 of Order XVIII. of the Rules of Court drawn up in 1874, under the Principal Act.

Compare with this Rule s. 56 of the Common Law Procedure Act, 1852.

As "Equity pleadings commonly take the form of a prolix narrative, with copies and extracts of deeds, correspondence and other documents set forth at needless length," * the Equity draughtsman will be well advised to give heed to this Rule; the consequences of neglect to do so will be the infliction of costs upon the party, for whom he is instructed.

The Court of Chancery itself, † indeed, has impressed upon its counsel that they must "take care that the deeds, writings, and records be not unnecessarily set out thereon *in hæc verba*, but that so much of them only as is pertinent and material be given, as Counsel may deem admissible without needless prolixity."

Rule 25.

Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

This is Rule 22 of Order XVIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule appears to be intended to restrain the effect of Rule 4, *supra*, that "every pleading shall contain a statement of the material facts on which the party pleading relies."

It will still, it would seem, be sufficient, *e.g.* to allege in an action for

* First Report of the Judicature Commission, p. 11.

† Order VIII., Rule 2, of the Consolidated Orders of the Court of Chancery.

malicious prosecution that "the defendant prosecuted legal proceedings against the plaintiff maliciously and without reasonable and probable cause," instead of "setting out the circumstances from which this may be inferred."

Rule 26.

Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice be material.

This is Rule 23 of Order XVIII., of the Rules of Crown drawn up in 1874 under the Principal Act.

Some such form as "of all which the said defendant had notice" will, it is apprehended, be a sufficient allegation of notice under this Rule.

The object of this Rule is similar to that of the preceding one, to restrict the effect of the 4th Rule.

Rule 27.

Wherever any contract or any relation between any persons does not arise from an express agreement, but is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

This is Rule 24 of Order XVIII., of the Rules of Court, drawn up in 1874, under the Principal Act.

It is apprehended that the common *indebitatus* counts can no longer be used under this Act, although some of the statements of claim given in Appendix (A), Part II., Section II., savour strongly of them. The express statement of the material facts "can hardly be satisfied by stating that the plaintiff sues for money payable by the defendant to the plaintiff for money lent." All counts must, like all pleas, be "special." Under these circumstances it will be seen what a valuable check the present Rule will afford upon prolixity.

Rule 28.

Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.

[E.g. Consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.]

This is Rule 25 of Order XVIII., of the Rules of Court, drawn up in 1874, under the Principal Act, with the note appended thereto by way of illustration.

This Rule embodies two rules of pleading which are placed by Mr. Serjeant Stephen* under the category of restrictive Rules:—"It is not necessary to state matter of law." "It is not necessary to state matter which would come more properly from the other side." *Ex facto jus oritur*; and the Judges can gather it for themselves. It is also unnecessary to leap till you come to the stile.† It is sufficient that each pleading should in itself contain a good *prima facie* case, without reference to possible objections not yet raised.

Rule 29.

Where an action proceeds in a District Registry all pleadings and other documents required to be filed shall be filed in the District Registry.

This is Rule 26 of Order XXIII of the Rules of Court, drawn up in 1874, under the Principal Act.

See Order XXXV, as to District Registries and the entry of proceedings therein. See also s. 64 of the Principal Act.‡

Rule 30.

In actions for damage by collision between vessels, unless the Court or a Judge shall otherwise order, each solicitor shall, before any pleading is delivered, file with the proper officer a document to be called a Preliminary Act, which shall be sealed up and shall not be opened until

* PP. 287, 290.

† Per Holt, C. J. in *Sir R. Bovey's case*, 1 Vent. 217.

‡ Other Rules relating to District Registries are Order V., Rules 2 and 3, Order XII, Rules 2, 3, 4, and 5.

ordered by the Court or a Judge, and which shall contain a statement of the following particulars :—

(a.) The names of the vessels which came into collision, and the names of their masters.

(b.) The time of the collision.

(c.) The place of the collision.

(d.) The direction of the wind.

(e.) The state of the weather.

(f.) The state and force of the tide.

(g.) The course and speed of the vessel when the other was first seen.

(h.) The lights, if any, carried by her.

(i.) The distance and bearing of the other vessel when first seen.

(k.) The lights, if any, of the other vessel which were first seen.

(l.) Whether any lights of the other vessel, other than those first seen, came into view before the collision.

(m.) What measures were taken, and when, to avoid the collision.

(n.) The parts of each vessel which first came into contact.

If both solicitors consent, the Court or a Judge may order the Preliminary Acts to be opened and the evidence to be taken thereon without its being necessary to deliver any pleadings.

* This is Rule 27 of Order XVIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied *verbatim* from Rules 62, 63, and 64 of the Rules and Orders of the Court of Admiralty.

The object of the practice in that Court of requiring Preliminary Acts is to obtain a statement *recenti facto* of the leading circumstances and to prevent either party varying his version of facts, so as to meet the allegations of his opponents.* The Court will never allow a party to contradict

* *The Vortigern*, Swa. 518; *The Inflexible*, Swa. 33.

his own Preliminary Act at the hearing, and an application to amend a mistake in a Preliminary Act must be made immediately on discovery.*

In cases where an order is made that the cause shall be heard on the Preliminary Acts without any pleadings, it is usual to have the cause heard forthwith on *vivâ voce* evidence in open Court.

ORDER XX.

PLEADING MATTERS ARISING PENDING THE ACTION.

Rule 1.

Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the defendant in his statement of defence, either alone or together with other grounds of defence. And if, after a statement of defence has been delivered, any ground of defence arises to any set-off or counter-claim alleged therein by the defendant, it may be pleaded by the plaintiff in his reply, either alone or together with any other ground of reply.

This is Rule 1 of the XIXth Order of the Rules of Court, drawn up in 1874, under the Judicature Act.

The first part of this Rule is founded on sections 68 and 69 of the Common Law Procedure Act, 1852, and the 22nd and 23rd Rules of the Reg. Gen. Trin. T., 1853.

A plea *pais darrein continuance* is, strictly speaking, a plea of a new matter of defence, *e.g.*, a release from the plaintiff, arising *after* plea, but it is used in s. 68 of the Common Law Procedure Act to denote a plea of new matter of defence arising after the commencement of the action, whether *before* or *after* plea. In the present order two kinds of pleas *pais darrein continuance* are distinguished; the first part of the present Rule deals with pleas *pais darrein continuance* before plea; the next Rule with pleas *pais darrein continuance* arising after plea, the third Rule deals with both.

By Rule 22 of the Reg. Gen. Trin. T., 1853, "a plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defences arising before the commencement of the action."

No form of plea *pais darrein continuance* is given in the Appendix; but it may be assumed that it will be stated, as heretofore, that the new matter arose "after the last pleading in *this* action." Of course this can only be done where, as under the present Rule, the new matter of defence arises *before* plea or statement of defence.

Further particulars as to this plea will be found in Archbold's Practice, Part II, Chapter 2.

* *The Vortigern, ubi supra.*

The second clause of this Rule introduces, of course, a new practice, founded on Order XIX, Rule 3, and sub-section (3) of s. 24 of the Principal Act.

Rule 2.

Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may, and where any ground of defence to any set-off or counter-claim arises after reply, or after the time limited for delivering a reply has expired, the plaintiff may, within eight days after such ground of defence has arisen, and by leave of the Court or a Judge, deliver a further defence or further reply, as the case may be, setting forth the same.

This is Rule 2 of the XIXth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

By section 69 of the Common Law Procedure Act, 1852, "no such plea shall be pleaded unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, and unless a Court or a Judge shall otherwise order." (There is no similar limitation of time, it will be perceived, in Rule 1, *supra*).

By pleading this plea the defendant abandons all his former pleas.*

It may be pleaded at any time before verdict, even after the jury have retired to consider their verdict.† If pleaded after a demurrer, it operates as a *retraxit* of the demurrer.‡

Rule 3.

Whenever any defendant, in his statement of defence, or in any further statement of defence, as in the last Rule mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence, which confession may be in the Form No. 2 in Appendix (B.) hereto, with such variations as circumstances may require, and he may thereupon sign judgment for his costs up to the time of the

* *Barber v. Palmer*, 1 Salk, 178.

† *Pearson v. Parkins*, B. N. P. 310.

‡ *Stoner v. Gibbons*, Moore, 871.

pleading of such defence unless the Court or a Judge shall, either before or after the delivery of such confession, otherwise order.

This is Rule 3 of the XIXth Order of the Rules of Court drawn up in 1874 under the Principal Act.

The form in Appendix (B) is new.

This Rule is taken from Rules 22 and 23 of the Reg. Gen. Trin. T., 1853. The words, "unless the Court or a Judge shall otherwise order" are, however, new.

Where a plea that the plaintiff, since the last pleading, had been convicted of felony, is pleaded *puis darrein continuance*, the plaintiff may confess the plea, and sign judgment for the costs under this Rule.*

ORDER XXI.

STATEMENT OF CLAIM.

Rule 1.

Subject to Rules 2 and 3 of this Order, the delivery of statements of claim shall be regulated as follows:—

(a.) If the defendant shall not state that he does not require the delivery of a statement of claim the plaintiff shall, unless otherwise ordered by the Court or a Judge, deliver it within six weeks from the time of the defendant's entering his appearance.

(b.) The plaintiff may, if he think fit, at any time after the issue of the writ of summons, deliver a statement of claim, with the writ of summons or notice in lieu of writ of summons, or at any time afterwards, either before or after appearance, and although the defendant may have appeared and stated that he does not require the delivery of a statement of claim: Provided that in no case where a defendant has appeared shall a statement be delivered more than six weeks after the appearance has been entered, unless otherwise ordered by the Court or a Judge.

(c.) Where a plaintiff delivers a statement of

* *Barnett v. L. & N. W. Ry. Co.*, 5 H. & N. 604.

claim without being required to do so, the Court or a Judge may make such order as to the costs occasioned thereby as shall seem just, if it appears that the delivery of a statement of claim was unnecessary or improper.

This is Rule 1 of Order XX. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule effects a considerable change in the practice at Common Law with respect to declaring. The plaintiff has hitherto had the whole of the term next after the appearance was entered to declare in, and this whether the appearance was entered in term time or in vacation. After the expiration of that interval the defendant was entitled to give him notice to declare within four days.* If the plaintiff was not ready to declare within the four days, he could apply to a Judge for further time to declare, which would be granted, if sufficient grounds were stated. At the expiration of the four days the defendant was entitled to sign judgment of *non pros* against him. If the defendant did not give the notice and obtain judgment of *non pros*, the plaintiff might declare at any time within a year next after the service of the writ.†

By Order XXXVII., Rule 4, of the Consolidated Orders of the Court of Chancery, "a defendant required to answer a bill must put in his plea, answer, or demurrer thereto, within twenty-eight days from the delivery to them or to his solicitor of a copy of the interrogatories which he is required to answer."

The practice at Common Law and in Chancery will now be assimilated and unless the Court or a Judge otherwise order, the plaintiff is to deliver his declaration within six weeks from the appearance of the defendant.

Subsection (b) introduces a considerable innovation by enabling a plaintiff to deliver a declaration with the writ of summons or before appearance. The only case in which a plaintiff could previously declare before appearance was under section 28 of the Common Law Procedure Act, 1852, in the case of the non-appearance of a defendant to a writ not specially indorsed.

The form in Appendix (A), Part I., No. 6, of the Memorandum of Appearance provides, as already stated, for an intimation by the defendant to the plaintiff, that he does or does not require a statement of claim. If the defendant forgoes a statement of claim the plaintiff may be fined in costs for unnecessarily or improperly delivering to him one.

Rule 2.

In Probate actions the plaintiff shall, unless otherwise ordered by the Court or a Judge, deliver his statement of claim within six weeks from the entry of appearance by the defendant, or from the time limited for his

* Common Law Procedure Act, 1852, s. 53.

† *Ib.*, s. 58.

appearance, in case he has made default; but, where the defendant has appeared, the plaintiff shall not be compelled to deliver it until the expiration of eight days after the defendant has filed his affidavit as to scripts.

This is Rule 2 of Order XX. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied from the 34th Rule of the Rules in contentious business of the Court of Probate, with the substitution of "six weeks" for one month, in order to assimilate the practice to that of the other Courts.

A form of Affidavit of Scripts is given, App. (B) No. 16.

Rule 3.

In Admiralty actions *in rem* the plaintiff shall, within twelve days from the appearance of the defendant, deliver his statement of claim.

This is Rule 3 of Order XX. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied from the 58th Rule of the Rules and Orders of the Court of Admiralty: "Within 12 days from the entry of an appearance, the plaintiff's Proctor* shall file his petition."

Rule 4.

Where the writ is specially indorsed, and the defendant has not dispensed with a statement of claim, it shall be sufficient for the plaintiff to deliver as his statement of claim a notice to the effect that his claim is that which appears by the indorsement upon the writ, unless the Court or a Judge shall order him to deliver a further statement. Such notice may be either written or printed, or partly written and partly printed, and may be in the Form No. 3 in Appendix (B) hereto, and shall be marked on the face in the same manner as is required in the case of an ordinary statement of claim. And when the plaintiff is ordered to deliver such further statement, it shall be delivered within such time as by such order shall be directed, and if no time be so limited then within the time prescribed by Rule 1 of this Order.

* "The petition is in the nature of a declaration at Common Law," Williams and Bruce's Admiralty Practice, p. 246.

This is Rule 4 of Order XX. of the Rules of Court, drawn up in 1874, under the Principal Act, "Appendix B," being substituted for "Schedule B" in order to adapt the Rule to the present Act.

As to writs specially indorsed, see Order III., Rule 7. As to the course of proceeding in case of non-appearance by the defendant, see Order XIII., Rule 3. As to calling upon the defendant to show cause why the plaintiff shall not be at liberty to sign final judgment, where the defendant has appeared, see Order XIV.

After the defendant has surmounted the perils of the XIVth Order, he will be confronted by the present Rule, telling him to look at the special indorsement, if he wants to know the nature of the plaintiff's claim. If the defence is a *bonâ fide* one, the defendant will be pretty sure to avail himself of the opportunity afforded him by this Rule of applying by motion to the Court, or by summons to a Judge for an Order calling upon the plaintiff to deliver a further statement of claim. If no time is mentioned in the order for the delivery of the further statement, it must be delivered within six weeks from the time of the defendant entering an appearance.

ORDER XXII.

DEFENCE.

Rule 1.

Where a statement of claim is delivered to a defendant he shall deliver his defence within eight days* from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a Judge.

This is Rule 1 of Order XXI. of the Rules of Court, drawn up in 1874, under the Principal Act.

The Rule is taken from s. 63 of the Common Law Procedure Act, 1852.

The Rule contemplates a defendant pleading to a claim without any statement of it, other than that endorsed on the writ, being delivered. See the form of Memorandum of Appearance, Appendix (A) Part I., No. 6, and Order XIX. Rule 2, and Order XXI. Rule 1.

Rule 2.

A defendant who has appeared in an action and stated that he does not require the delivery of a statement of claim, and to whom a statement of claim is not delivered, may deliver a defence at any time within eight days after his appearance, unless such time is extended by the Court or a Judge.

* Pleas in abatement were pleaded within four days, but they are abolished by Order XIX., Rule 13.

This is Rule 2 of Order XXI. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule must tend greatly to expedite the proceedings, if defendants waive their right to receive a statement of claim. The eight days will then be substituted for the six weeks and eight days, which must (under Order XXI., Rule 1 (a), intervene, if the defendant insists on receiving a statement of claim.

"And to whom a statement of claim is not delivered." These words refer to Order XXI., Rule 1 (b).

Rule 3.

Where leave has been given to a defendant to defend under Order XIV, Rule 1, he shall deliver his defence, if any, within such time as shall be limited by the order giving him leave to defend, or if no time is thereby limited, then within eight days after the order.

This is Rule 3 of Order XXI. of the Rules of Court, drawn up in 1874 under the Principal Act.

"Order XIV., Rule 1," being substituted for "Rule 7 in the Schedule to the Act" (of 1873), in order to bring the Rule into harmony with the present Act.

"Order XIV., Rule 1." See the whole of that Order, which relates to the speedy process provided for the recovery of debts and liquidated demands where the writ is specially indorsed.

See also Order XXI., Rule 4, and the note thereto.

Rule 4.

Where the Court or a Judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the Court may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted.

This is Rule 4 of Order XXI. of the Rules of Court, drawn up in 1874, under the Principal Act.

Under s. 52 of the Common Law Procedure Act, 1852, a defendant, whose pleading tends to "prejudice, embarrass, or delay the fair trial of the action," may be visited similarly with costs.

Rule 5.

Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other person or persons, he

shall add to the title of his defence a further title similar to the title in a statement of complaint, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff.

This is Rule 5 of Order XXI. of the Rules of Court, drawn up in 1874, under the Principal Act.

See Order XIX., Rules 3 and 10, and subsection (3) of section 24 of the Principal Act.

This practice is, of course, new.

Rule 6.

When any such person as in the last preceding Rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same rules as are hereinbefore contained with respect to the service of a writ of summons, and every defence so served shall be indorsed in the Form No. 4 in Appendix (B) hereto, or to the like effect.

This is Rule 6 of Order XXI. of the Rules of Court, drawn up in 1874, under the Principal Act, "Appendix B" being substituted for "Schedule (B)," in order to adapt the Rule to the present Act.

This practice, of course, is new.

The notice calls upon the third party to appear within eight days from service, as in the case of an ordinary writ of summons.

A somewhat similar process is prescribed by Order XVI., Rule 18, for securing the appearance of a third party, when a defendant claims contribution, &c., from him with a view to helping the defendant to meet his obligations to the plaintiff. In the case contemplated by the present Rule, the third party is a co-defendant of the plaintiff to a *quasi* cross action by the defendant. In the case contemplated by Order XVI., Rule 17, the third party is a co-defendant of the defendant summoned by the defendant to his aid.

Form No. 4 gives notice to the third party that, if he fails to appear, judgment will be given *against* him. Form No. 1 (applicable to Order XVI., Rule 18) gives notice to the third party that, if he fails to appear, he will be *estopped* by the judgment.

Rule 7.

Any person not a defendant to the action, who is served with a defence and counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action.

This is Rule 7 of Order XXI. of the Rules of Court, drawn up in 1874, under the Principal Act.

This practice is also new. Compare Order XVI., Rule 20.

Rule 8.

Any person named in a defence, as a party to a counter-claim thereby made, may deliver a reply within the time within which he might deliver a defence if it were a statement of claim.

This is Rule 8 of Order XXI. of the Rules of Court, drawn up in 1874, under the Principal Act.

This practice is also new. Compare Order XVI., Rule 21.

Rule 9.

Where a defendant by his statement of defence sets up a counter-claim, if the plaintiff or any other person named in manner aforesaid as party to such counter-claim contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time before reply, apply to the Court or a Judge for an order that such counter-claim may be excluded, and the Court or a Judge may, on the hearing of such application, make such order as shall be just.

This is Rule 9 of Order XXI. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is a repetition of the second part of Rule 3 of Order XIX.

Rule 10.

Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant,

give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

This Rule is a re-enactment of Rule 21 of the Principal Act.

The Rule is new.

Rule 11.

In Probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Court of Probate.

This is Rule 10 of Order XXI. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied from Rule 41 of the Rules of the Court of Probate, "defence" being substituted for "plea," and "Court of Probate" for "Prerogative Court."

ORDER XXIII.

DISCONTINUANCE.

The plaintiff may, at any time before the receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this Rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or

discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a Judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.

This Rule is a re-enactment of the four first clauses of Rule 46 of the Principal Act. The remainder of the 46th Rule of the Principal Act will be found under Order XLI., Rule 6.

If the plaintiff in an action at law found that he had misconceived his action, or that through some defect in the pleadings or otherwise, he would not be able to maintain it, he obtained, before argument or demurrer, or verdict, a side-bar rule, ordering that, upon payment of the defendant's costs, the action be discontinued. Part of an action could not be discontinued, as the discontinuance put an end to the whole of it.* In order to discontinue after judgment and demurrer, or verdict, the leave of the Court or Judge was necessary. Before the Rules of Hil. T., 1853, it was requisite to get the consent of the defendant's attorney to the rule, if it were sought to utilize it after plea pleaded; but by the 23rd Rule of that Term this consent was declared to be no longer necessary, and in lieu of it it was stipulated that the Rule must contain an undertaking to pay the costs, and a consent that, if they should not be paid, the defendant might sign judgment of *non pros*. If the rule were not acted on, in the case of a discontinuance before plea, the plaintiff might be compelled to proceed.† If the plaintiff went on and obtained a verdict, the verdict would not have been set aside, as the rule, not having been acted on, became a nullity.‡ After a discontinuance, the plaintiff might have commenced a new action for the same cause, a judgment of discontinuance being in the nature of a nonsuit.§

It may be added that, by consent, the rule to discontinue might be drawn up without costs.||

In Equity, the proceeding analogous to a discontinuance was a dismissal of his bill by a plaintiff. Before appearance of a defendant, the plaintiff

* *Barton v. Polkingthorne*, 16 M. and W., 8.

† *Beeton v. Jupp*, 15 M. and W., p. 149.

‡ *Edginton v. Proudman*, 1 D. P. C., 152.

§ *Mayor of Macclesfield v. Gee*, 13 M. and W., 470.

|| *Archbold's Practice*, p. 1485.

might dismiss the Bill as against him without costs.* After appearance, and before decree, the plaintiff might generally, on motion of course or a petition of course in the Rolls, have obtained an order to dismiss the Bill on payment of costs; and by consent, even without payment of costs,† and this, in a proper case, even without the defendant's consent.‡ Where the plaintiff applied to dismiss the Bill without costs and without the defendant's consent, the application to dismiss was usually made by special motion, of which notice was served on the defendant.§ The alterations made in the former practice appear to be that, in future, proceedings by way of discontinuance will apply to the Chancery Division as well as to the Common Law Division of the Supreme Court; that discontinuance is to be by notice in writing, instead of by side-bar rule; that "any part or parts" of the plaintiff's "alleged cause of complaint" may be discontinued; that the action cannot be discontinued by the plaintiff after he has taken any proceeding subsequent to the receipt of the statement of defence, *e.g.*, after his reply, without leave of the Court or of a Judge. (Under the former practice he might discontinue at any time before verdict, without leave).

The last clause of this Rule should not have been classed under "discontinuance," as it is a recognized principle that a *plaintiff only* can discontinue. The expression "discontinue" is not, however, applied, it will be seen, to the defendant.

Leave to withdraw a plea has hitherto been, in general, granted, on such terms as to costs or otherwise as the Court or a Judge might deem fit. The Court or a Judge would, in like manner, have allowed a plaintiff to withdraw a replication.||

There seems to have been some confusion in the mind of the draughtsman of this Rule between a discontinuance and the withdrawal of the record. Where the record is withdrawn, it may, by leave, be re-entered at the same assizes. After a discontinuance the plaintiff is put to a new action for the same cause.¶

ORDER XXIV.

REPLY AND SUBSEQUENT PLEADINGS.

Rule 1.

A plaintiff shall deliver his reply, if any, within three weeks after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a Judge.

This is Rule 1 of the XXIIInd Order of the Rules of Court drawn up in 1874 under the Principal Act.

* *Thompson v. Thompson*, 7 Beav., 350.

† *Dixon v. Parks*, 1 Ver. Jun., 402.

‡ *Knox v. Brown*, 2 Bro. C. C., 166.

§ 1 Daniel's Chancery Practice, pp. 690, 691.

|| See *Alder v. Chip*, 2 Burr., 755.

¶ As to discontinuance in ejectment, see s. 200 of the Common Law Procedure Act, 1852.

This is a salutary amendment of the law. It is not a little curious that at Common Law hitherto there has been *no limit at all* to the time within which a plaintiff might reply, except that one month's notice must have been given, if a year had elapsed since the last pleading.* In order to compel a plaintiff to reply at all, it was necessary for the defendant to give the plaintiff notice to proceed within four days, "otherwise judgment."†

In Equity a replication must have been filed within four weeks after the answer, or *the last* of the answers required to be put in by the defendant, or, where the plaintiff had undertaken to reply to a plea, within four weeks after the date of his undertaking; or, where a traversing note had been filed, within four weeks after the filing of the traversing note; or, where he had amended his Bill without requiring an answer, within one week after the expiration of the time within which the defendant might have answered, but did not desire to answer, or within fourteen days after the refusal of further time to put in an answer, or within fourteen days after the filing of the answer, unless the plaintiff had within such fourteen days obtained a special order to except to such answer or to re-amend the Bill.‡

If the plaintiff at Common Law was not ready to reply within the four days limited by the notice to proceed, he might have obtained further time by summons. The plaintiff in Equity might also have applied by motion or summons for an order to enlarge the time for filing his replication.

While the present Rule fixes three weeks as the time within which a replication must usually be delivered, it carefully preserves the right to apply for an extension of time.

Rule 2.

No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a Judge, and then upon such terms as the Court or Judge shall think fit.

This is Rule 2 of the XXIInd Order of the Rules of Court, drawn up in 1873 under the Principal Act. By requiring that the "leave of the Court or a Judge" should be necessary in order to "plead subsequent to reply," an obstacle is interposed in the way of protracted pleadings. The alternate allegations of fact after the "replication" are known as the "rejoinder," "surrejoinder," "rebutter," and "surrebutter." "After the surrebutter," says Mr. Stephens, "the pleadings have no distinctive names; for, beyond that stage, they are very seldom found to extend."§

The present Rule is founded on the recommendations of the Judicature Commission:—"The pleadings should not go beyond the reply, save by special permission of a Judge."||

* Reg. Gen. Hil. T., 1853, R. 176.

† Common Law Procedure Act, 1852, s. 53.

‡ Consolidated Orders of the Court of Chancery, Order XXXIII. 10 (1) (2); 12 (1) (2) (3).

§ Principles of Pleading, p. 55, 6th ed.

|| First Report, p. 11.

Rule 3.

Subject* to the last preceding Rule, every pleading subsequent to reply shall be delivered within four days after the delivery of the previous pleading, unless the time shall be extended by the Court or a Judge.

This is Rule 3 of the XXIIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

"Subject to the last preceding rule," *i.e.*, subject to leave to plead subsequently to the reply being given.

Under the previous practice the defendant might have been called upon, by notice from the plaintiff, to rejoin; the plaintiff by notice from the defendant to surrejoin; the defendant by notice from the plaintiff to rebut; and the plaintiff by notice from the defendant to surrebut, *within four days*, otherwise judgment, under the provisions of the 53rd section of the Common Law Procedure Act, 1852.

ORDER XXV.

CLOSE OF PLEADINGS.

As soon as either party has joined issue upon any pleading of the opposite party simply without adding any further or other pleading thereto, the pleadings as between such parties shall be deemed to be closed.

This is Order XXIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

The joinder of issue in the forms in Appendix (C) is as follows:—"The plaintiff joins issue with the defendant upon his defence or his statement of defence," the joinder of issue being the reply, and the joinder of issue being to *the whole* of the defence, not to any particular plea or part of the defence. (Compare the forms of joinder of issue given by the Common Law Procedure Act, 1852, section 79.)

In Equity, "the cause is deemed to be completely to issue upon filing the replication."†

ORDER XXVI.

ISSUES.

Where in any action it appears to a Judge that the statement of claim or defence or reply does not sufficiently define the issues of fact in dispute between the parties, he

* A curious typographical error in the Rule as originally framed is corrected, "subject" being substituted at the commencement for "subsequent," which is clearly an *erratum*.

† Daniel's Chancery Practice, p. 732.

may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the Judge.

This Rule is a re-enactment of Rule 19 of the Principal Act.

This Rule contains a curious reproduction of a rule which prevailed during the infancy of our system of pleading, viz., that the pleadings should be settled, and the issue evolved in presence of the Judge, and with his sanction, in open Court. Any one who wishes to refer to this ancient rule of pleading will find abundant illustrations of it in the Year Books.

ORDER XXVII.

AMENDMENT OF PLEADINGS.

Rule 1.

The Court or a Judge may, at any stage of the proceedings, allow either party to alter his statement of claim or defence or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties.

This Rule is a re-enactment of the fourth part of Rule 18 of the Principal Act.

Amendments in case of mis-joinder or non-joinder of parties have been already treated of in the notes to Order XVI., Rules 1 and 13.

The present Rule is founded on sections 52 and 222 of the Common Law Procedure Act, 1852, section 96 of the Common Law Procedure Act, 1854, and section 36 of the Common Law Procedure Act, 1860.

Fines for "*sham pleading*" once formed a source of revenue to the Crown.* It has always been strongly reprobated by the Judges, and they allowed the plaintiff, when the defendant has recourse to it, to sign judgment as for want of plea, long before the passing of the Common Law Procedure Acts.†

"Allow either party to alter his statement of claim or defence or reply." Even before the Common Law Procedure Acts, the plaintiff at Common Law was allowed to strike out a count of the declaration,‡ and add a new one,§ or increase the damages,¶ &c., or add to the number of,|| or

* Com. Dig. "Perogative," D. 22.

† Day's Common Law Procedure Acts, pp. 85, 86.

‡ *Aylwin v. Told*, 1 Bing., N.C., 170.

§ *Brown v. Crump*, 3 Taunt., 300.

¶ *Dew v. Katz*, 8 C. and P., 315.

|| *Lakin v. Watson*, 2 Dowl., 633.

strike out parties named in the declaration,* but it was not till after the Common Law Procedure Acts were passed, that the plaintiff was allowed to add a new count containing a new substantive cause of action.†

Before the Common Law Procedure Acts, the defendant at Common Law might in general have obtained leave to amend by adding a further plea, if necessary for his defence, or if it were a matter of doubt whether it was so or not.

And a plea might have been allowed to be added after verdict, and a new trial granted.‡ After the Common Law Procedure Acts were passed, the Common Law Courts and Judges might “at all times” have allowed a plea to be added.

Ample opportunity was given to a plaintiff in Equity to amend his bill.§ If a defendant desired to correct his answer after it had been filed, he had to file a supplemental answer (see *Wells v. Wood*, 10 Ves., 401).

“Scandalous statements.” This is a phrase imported into the Supreme Court with the Court of Chancery. Scandal in Equity consists in the allegation of anything which it is unbecoming the dignity of the Court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause.¶ Nothing material, however, is scandalous.||

Scandal in pleadings before the Court might be excepted to, at any stage of the suit,** and upon the production of an order allowing the exceptions, it was the duty of the officer having the custody of the pleading to expunge such parts of it as the Court held to be scandalous.†† Costs were generally given to the party aggrieved by the scandalous matter.

“The real question or questions in controversy.” It will be perceived that the words “in the existing suit” have been omitted, thus enlarging the power of amendment.

Rule 2.

The plaintiff may, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared.

* *Holmes v. Pinney*, 6 Dowl., 627.

† Archbold's Practice, pp. 239, 240; *Smith v. Dixon*, 4 Dowl., 571.

‡ See *Kirby v. Simpson*, 3 Dowl. 791.

§ See Order IX. (II) of the Consolidated Orders of the Court of Chancery.

¶ Wyatt's P.R., 383. || Daniel's Chancery Practice, p. 290.

** *Ellison v. Burgess*, 2 P. Wms., 312 n.

†† Order XVI., Rule 4, of the Consolidated Orders of the Court of Chancery.

This is Rule 1 of Order XXIV., of the Rules of Court, drawn up in 1874, under the Principal Act.

This is a new method of amendment at Common Law. The rule there hitherto has been that parties could not amend their own proceedings; the leave of the Court or a Judge was necessary.*

Rule 3.

A defendant who has set up in his defence any set-off or counter-claim may, without any leave, amend such set-off or counter-claim at any time before the expiration of the time allowed him for pleading to the reply, and before pleading thereto, or in case there be no reply, then at any time before the expiration of twenty-eight days from the filing of his defence.

This is Rule 2 of Order XXIV. of the Rules of Court, drawn up in 1874, under the Principal Act.

This practice, of course, is new. Twenty-eight days, as we have seen, from the delivery to him of a copy of the plaintiff's interrogations, was the period allowed by the Court of Chancery to the defendant for putting in his plea, answer or demurrer to a Bill.

"Pleading to the reply." See Order XXII., Rule 8, and as to the right generally of the defendant to set up a counter-claim, see subsection (3) of section 24 of the Principal Act, and Order XIX., Rule 3, *supra*.

Rule 4.

Where any party has amended his pleading under either of the last two preceding Rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the Court or a Judge to disallow the amendment, or any part thereof, and the Court or Judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may seem just.

This is Rule 3 of Order XXIV., of the Rules of Court, drawn up in 1874, under the Principal Act.

This practice, like that of the two Rules referred to, is, of course, new.

* See *Siggers v. Sansom*, 2 Dowl., 745; *Bate v. Bolton*, 4 Dowl., 677; *Wright v. Skinner*, 5 Dowl., 92.

Rule 5.

Where any party has amended his pleading under Rules 2 or 3 of this Order the other party may apply to the Court or Judge for leave to plead or amend his former pleading within such time and upon such terms as may seem just.

This is Rule 4 of Order XXIV. of the Rules of Court, drawn up in 1874, under the Principal Act, "Rule 2 or 3," being substituted for "Rule 1 or 2," in order to bring the Rule into harmony with the present Act.

This is new. See notes to Rules 2 and 3 of this Order.

Rule 6.

In all cases not provided for by the preceding Rules of this Order, application for leave to amend any pleading may be made by either party to the Court or a Judge in chambers, or to the Judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may seem just.

This is Rule 5 of Order XXIV., of the Rules of Court, drawn up in 1874, under the Principal Act.

The application to amend should in general be made to a Judge at Chambers, by summons, calling upon the opposite party to show cause why the party applying should not have leave to amend, but there is an appeal to the Court, to which application also under special circumstances may be made, in the first instance. The amendment is generally allowed only "on payment of costs."*

"In cases not provided for by the preceding Rules of this Order." The Rules referred to here are, probably, Rules 2, 3, 4 and 5. The application under Rule 1 would be in one of the three ways specified in this Rule. "Not provided for" may, however, mean in which *the mode* of amending is not pointed out, and in this sense the words would include Rule 1.

Rule 7.

If a party who has obtained an order for leave to amend a pleading delivered by him does not amend the same within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days

* *Wall v. Lyon*, 9 Bing., 411.

from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become *ipso facto* void, unless the time is extended by the Court or a Judge.

This is Rule 6 of Order XXIV. of the Rules of Court, drawn up in 1874, under the Principal Act.

The party at Common Law who obtained an order was at liberty to act upon it, or to abandon it at his option; if he chose the latter he might proceed as if the order had not been made.*

The present Rule will be useful in fixing the time within which the party who has obtained the order must make up his mind whether he will avail himself of it or not.

The Rule is copied from Order IX. Rule 24 of the Consolidated Orders of the Court of Chancery:—"Where the plaintiff obtains an order for leave to amend his bill, and does not amend the same within the time thereby limited for that purpose, or if no time is so limited, then within 14 days from the date of such order, such order to amend becomes void."†

The party will be deprived of the right of obtaining a second order by the present Rule.

Rule 8.

A pleading may be amended by written alterations in the pleading which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the pleading difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the pleading as amended.

This is Rule 7 of Order XXIV. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is taken from Order IX., Rule 18, of the Consolidated Orders of the Court of Chancery.

"144 words," *i.e.*, two folios of 72 words each. See *Stone v. Davies*, 38 M. & G., 240, where, however, the folios referred to were to be reckoned as containing 90 words each.

"Or are so numerous." It was decided in *John v. Lloyd*,‡ that although the amendments do not in any one place exceed two folios, the Clerk of Records and Writs has a discretion to refuse to file the bill without a reprint, if the amendments are numerous and complicated.

* *Black v. Sangster*, 1 C. M. & R., 521. See *Pugh v. Kerr*, 6 M. & W. 17.

† *Nicholson v. Peile*, 2 Beav., 497.

‡ 1 L. R. Ch. 64.

Rule 9.

Whenever any pleading is amended, such pleading when amended shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, viz. : "Amended day of ."

This is Rule 8 of Order XXIV. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is taken from Order IX., Rule 19, of the Consolidated Orders of the Court of Chancery.

Rule 10.

Whenever a pleading is amended, such amended pleading shall be delivered to the opposite party within the time allowed for amending the same.

This is Rule 9 of Order XXIV. of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule is taken from Order IX., Rule 20, of the Consolidated Orders of the Court of Chancery, with the addition of the words at the end, "within the time allowed for amending the same."

ORDER XXVIII.

DEMURRER.

Rule 1.

Any party may demur to any pleading of the opposite party, or to any part of a pleading setting up a distinct cause of action, ground of defence, set-off, counter-claim, reply, or, as the case may be, on the ground that the facts alleged therein do not show any cause of action, or ground of defence to a claim or any part thereof, or set-off, or counter-claim, or reply, or as the case may be, to which effect can be given by the Court as against the party demurring.

The only reference to a demurrer in the schedule to the Principal Act is contained in the third part of Rule 18, "A demurrer to any statement may be *filed* in such manner and form as may be prescribed by Rules of Court."

The present Rule is Rule 1 of Order XXV. of the Rules of Court, drawn up in 1874, under the Principal Act.

When a pleading is clearly bad in substance it is generally advisable to demur to it, as the judgment upon the demurrer will be final, and determine the cause or the part of the cause to which it relates in the simplest and cheapest manner.*

As to set-off and counter claims see Order XIX. Rule 3, and subsection (3) of section 24 of the Principal Act.

Rule 2.

A demurrer shall state specifically whether it is to the whole or to a part, and if so, to what part, of the pleading of the opposite party. It shall state some ground in law for the demurrer, but the party demurring shall not, on the argument of the demurrer, be limited to the ground so stated. A demurrer may be in the Form 28 in Appendix (C) hereto. If there is no ground, or only a frivolous ground of demurrer stated, the Court or Judge may set aside such demurrer with costs.

"Form 28 in Appendix (C)" is Form 1 in Schedule (C) to the Rules of Court, drawn up in 1874, under the Principal Act. The present Rule is (with this alteration in the reference to the Form) Rule 2 of Order XXV. of those Rules of Court.

The form of demurrer provided by s. 89 of the Common Law Procedure Act, 1852, does not contemplate the mention of any "ground in law for the demurrer" in the body of the demurrer. The ground of law was to be stated in the margin, the demurrer simply alleging that the pleading demurred to was "bad in substance." A reference to the new form in Appendix (C) No. 28, will show that the old form has, in this respect, been departed from. The defendant, as in equity,† states expressly that he "*demurs*" to the previous pleading or to some specific part of it; and then goes on to say "that the same is bad *in law* on the ground (here state a ground of demurrer) and on other ground sufficient in law to sustain this demurrer." The ground will thus be stated in the body of the demurrer instead of in the margin as hitherto. A demurrer without a marginal note or with only a frivolous ground stated might, under the former practice, have been set aside on summons.‡ The form of the marginal note was—"one of the matters of law intended to be argued is, that," &c. The new form, as we have seen, says that there are "*other grounds*." In equity it was necessary to state one or more "*causes of demurrer*."§

Rule 3.

A demurrer shall be delivered in the same manner

* Bullen and Leake's Precedents of Pleading, p. 820, n. (a), 3rd ed.

† See the forms in Daniel's Chancery Forms, chaps. 14 and 18.

‡ *Lucy v. Umbers*, 3 Vovl., 732. See a form of such a summons in Chitty's Forms, pp. 474, 475.

§ Daniel's Chancery Practice, 503.

and within the same time as any other pleading in the action.

This is Rule 3 of Order XXV. of the Rules of Court, drawn up in 1874, under the Principal Act.

A demurrer must be delivered (the idea of filing has been abandoned) within eight days if it is a demurrer to a statement of claim; within three weeks if it is a demurrer to a statement of defence."*

Rule 4.

A defendant desiring to demur to part of a statement of claim, and to put in a defence to the other part, shall combine such demurrer and defence in one pleading. And so in every case where a party entitled to put in a further pleading desires to demur to part of the last pleading of the opposite party he shall combine such demurrer and other pleading.

This is Rule 4 of Order XXV. of the Rules of Court, drawn up in 1874, under the Principal Act

This Rule is taken from the practice of the Court of Chancery. See Chapter XXIII. of the Vol. of "Forms" accompanying Daniel's Chancery Practice. The joint demurrer and plea in Chancery is headed, "The demurrer and plea of A.B., the above-named defendant, to the Bill of Complaint of the above-named plaintiff." The form then continues:—"I, the defendant A.B., do demur, &c., and for cause of demurrer do shew that," &c.; and I, the defendant A.B., do plead, and for plea say that," &c.

Rule 5.

If the party demurring desires to be at liberty to plead as well as demur to the matter demurred to, he may, before demurring, apply to the Court or a Judge for an order giving him leave to do so; and the Court or Judge, if satisfied that there is reasonable ground for the demurrer, may make an order accordingly, or may reserve leave to him to plead after the demurrer is overruled, or may make such other order and upon such terms as may be just.

This is Rule 5 of Order XXV. of the Rules of Court drawn up in 1874 under the Principal Act.

* See Order XXII., Rule 1, Order XXIV., Rule 1.

This Rule is founded on section 80 of the Common Law Procedure Act, 1852.

"If satisfied." The enactment just cited requires that the party or his attorney (if required) should make an affidavit that he believes in the truth of his plea and goodness of his demurrer.

Rule 6.

When a demurrer either to the whole or part of a pleading is delivered, either party may enter the demurrer for argument immediately, and the party so entering such demurrer shall on the same day give notice thereof to the other party. If the demurrer shall not be entered, and notice thereof given within ten days after delivery, and if the party whose pleading is demurred to does not within such time serve an order for leave to amend, the demurrer shall be held sufficient for the same purposes and with the same result as to costs as if it had been allowed on argument.

This is Rule 6 of Order XXV. of the Rules of Court drawn up in 1874, under the Principal Act.

The Rule is taken from Order XIV., Rules 11, 14 and 15 of the Consolidated Order of the Court of Chancery, "ten days after delivery," being however, substituted for 12 days after filing."

Rule 7.

While a demurrer to the whole or any part of a pleading is pending, such pleading shall not be amended, unless by order of the Court or a Judge; and no such order shall be made except on payment of the costs of the demurrer.

This is Rule 7 of Order XXV. of the Rules of Court drawn up in 1874 under the Principal Act.

Prior to this enactment of the pleading demurred to was, at Common Law, generally allowed, *as of course*, on payment of costs. In some cases it might be allowed even without costs, or on payment of nominal costs.*

Rule 8.

Where a demurrer to the whole or part of any plead-

* *Tomlinson v. Ballard*, 4 Q.B., 642. 2 Archbold's Practice, p. 927.

ing is allowed upon argument, the party whose pleading is demurred to shall, unless the Court otherwise order, pay to the demurring party the costs of the demurrer.

This is Rule 8 of Order XXV. of the Rules of Court drawn up in 1874 under the Principal Act.

By the 3 and 4 Wm. IV., c. 42, s. 34, "When judgment shall be given either for or against a plaintiff or a defendant upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf."*

Under this Statute the party obtaining judgment at Common Law is entitled to the costs of the demurrer, whatever may be the results of the cause.†

The present Rule appears to impose some restriction on this, as regards the party demurring at Common Law, by the insertion of the words "unless the Court otherwise order."

This Rule is copied from Order XIV., Rule 13, of the Consolidated Orders of the Court of Chancery, (cited under Rule 9, *infra*), in which the words, "unless the Court shall otherwise direct," occur.

Rule 9.

If a demurrer to the whole of a statement of claim be allowed, the plaintiff, subject to the power of the Court to allow the statement of claim to be amended, shall pay to the demurring defendant the costs of the action, unless the Court shall otherwise order.

This is Rule 9 of Order XXV. of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule is in accordance with the Chancery Practice. "Where a demurrer to the whole or part of a Bill is allowed upon argument the plaintiff, *unless the Court shall otherwise direct*, shall pay to the demurring party the costs of the demurrer, and, *when the demurrer is to the whole Bill, the cost of the suit also*." Compare Reg. Gen. Hil. T. 1853, Rule 62.

Rule 10.

Where a demurrer to any pleading or part of a pleading is allowed in any case not falling within the last preceding Rule, then (subject to the power of the Court to allow an amendment) the matter demurred to shall as between the parties to the demurrer be deemed to be struck

* See also the older Stat. 8 and 9 Wm. III., c. 11, s. 2.

† *Bentley v. Dawes*, 10 Ex. 347; *Burdon v. Flour*, 7 D. P. and C. 786.
1 Lush's Practice, p. 789.

out of the pleadings, and the rights of the parties shall be the same as if it had not been pleaded.

This is Rule 10 of Order XXV. of the Rules of Court drawn up in 1874 under the Principal Act.

"In any case not falling within the preceding Rule," *i.e.* in any case where the demurrer is *not to the whole* of the statement of claim.

The Rule embodies substantially the practice as to "partial demurrers" of the Court of Chancery. (See "Daniel's Chancery Practice," 513, 514.)

Rule 11.

Where a demurrer is overruled the demurring party shall pay to the opposite party the costs occasioned by the demurrer, unless the Court shall otherwise direct.

This is Rule 11 of Order XXV. of the Rules of Court drawn up in 1874 under the Principal Act.

See Rule 8 of this Order, and the Statutes there cited.

This Rule appears to impose some restrictions on the right of the party at Common Law, whose pleading is demurred to, to recover the costs of the demurrer, by the insertion of the words, "unless the Court shall otherwise direct."

The Rule is founded on Order XIV., Rule 12 of the Consolidated Orders of the Court of Chancery:—"When any demurrer is overruled, the defendant shall pay to the plaintiff the taxed costs occasioned thereby, *unless the Court shall otherwise direct.*"

Rule 12.

Where a demurrer is overruled, the Court may make such order, and upon such terms as to the Court shall seem right, for allowing the demurring party to raise by pleading any case he may be desirous to set up in opposition to the matter demurred to.

This is Rule 12 of Order XXV. of the Rules of Court drawn up in 1874 under the Principal Act.

The state of the law prior to this enactment was, that, if the judgment in demurrer on a single issue were for the defendant, it was a *final* judgment against the plaintiff of "*nil capiat per breve.*"

The plaintiff also might sign interlocutory or final judgment, as the case might be, if the judgment in demurrer on a single issue were given in his favour.*

The present Rule will enable the demurring party to obtain leave to plead to the matter demurred to after the demurrer has been overruled.

This practice is derived from that of the Court of Chancery. There the

* See bold's Practice, p. 934.

defendant, after his demurrer was overruled, might, by leave of the Court, make the same defence by plea.*

Rule 13.

A demurrer shall be entered for argument by delivering to the proper officer a memorandum of entry in the Form No. 29 in Appendix (C).

"Form No. 29 in Appendix (C)" is form No. 2 in Schedule (C) to the Rules of Court drawn up in 1874 under the Principal Act. The present Rule (with this alteration in the reference to the form), is Rule 13 of Order XXV. of those Rules of Court.

ORDER XXIX.

DEFAULT OF PLEADING.

Rule 1.

If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a Judge to dismiss the action with costs for want of prosecution, and on the hearing of such application the Court or Judge may, if no statement of claim have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as to the Court or Judge shall seem just.

This is Rule 1 of Order XXVI. of the Rules of Court drawn up in 1874 under the Principal Act.

A plaintiff is not "bound" to deliver a statement of claim where the defendant has stated in his Memorandum of Appearance that he does not require any.

"Dismissing an action for want of prosecution is better known by the familiar appellation of "judgment of *non pros*," which is defined by Mr. Archbold† to mean "a final judgment against the plaintiff for costs only, signed by the defendant, whenever the plaintiff, in any stage of the action, neglects to prosecute the suit or part of it within the time limited by the practice of the Court for that purpose."

The phrase, dismissing a bill for want of prosecution, is a familiar one in

* Mitford on Pleading, 216. Daniel's Chancery Practice, 517.

† Archbold's Practice, p. 1479.

Equity. As to the cases in which a defendant may move the Court that a bill be dismissed with costs for want of prosecution, see Order XXXIII. (III.) of the Consolidated Orders of the Court of Chancery.

As already stated, after judgment of *non pros* a plaintiff might commence a new action against a defendant for the same cause.* An order to dismiss a bill for want of prosecution could be pleaded in bar to a new bill for the same matter.†

Rule 2.

If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, deliver a defence or demurrer, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs.

This is Rule 2 of Order XXVI., of the Rules of Court drawn up in 1874 under the Principal Act.

The analogous proceeding in the case of default of appearance will be found in Order XIII., Rule 5. (See Notanda.)

By section 93 of the Common Law Procedure Act, "in actions where the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default shall be final."

It is apprehended that a defendant is not *bound*, under Order XXII., Rule 3, to deliver a statement of defence, where he has waived his right to a statement of claim.

Rule 3.

When in any such action as in the last preceding Rule mentioned there are several defendants, if one of them make default as mentioned in the last preceding Rule, the plaintiff may enter final judgment against the defendant so making default, and issue execution upon such judgment without prejudice to his right to proceed with his action against the other defendants.

This is Rule 3 of Order XXVI., of the Rules of Court drawn up in 1874 under the Principal Act.

See Order XIII., Rule 4, where a similar principle is applied. (See the note to that Rule, p. 326). The principle is extended here to a debt or liquidated demand, when the writ is *not specially endorsed*.

Rule 4.

If the plaintiff's claim be for detention of goods and

* Archbold's Practice, p. 1482.

† Daniel's Chancery Practice, p. 714.

pecuniary damages, or either of them, and the defendant makes default as mentioned in Rule 2, the plaintiff may enter an interlocutory judgment against the defendant, and a writ of inquiry shall issue to assess the value of the goods, and the damages, or the damages only, as the case may be. But the Court or a Judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way in which any question arising in an action may be tried.

This is Rule 4 of Order XXVI., of the Rules of Court drawn up in 1874 under the Principal Act.

Where the action proceeds in a District Registry, and the plaintiff is entitled to enter interlocutory judgment under this Rule, such interlocutory judgment, and, where damages have been assessed, final judgment is to be entered in the District Registry, unless the Court or a Judge shall otherwise order. Order XXXV., Rule 2.

The proceeding in this case is identical with that prescribed by Order XIII., Rule 6, in default of appearance. See the note to that Rule. pp. 328, 329.

The Court or a Judge will probably in all cases when the damages are "substantially" matter of calculation refer the ascertaining of the *quantum* to a Master or Referee or District Register.

Rule 5.

When in any such action as in Rule 4 mentioned there are several defendants, if one of them make default as mentioned in Rule 2, the plaintiff may enter an interlocutory judgment against the defendant so making default, and proceed with his action against the others. And in such case, damages against the defendant making default shall be assessed at the same time with the trial of the action or issues therein against the other defendants, unless the Court or a Judge shall otherwise direct.

This is Rule 5 of Order XXVI. of the Rules of Court, drawn up in 1874, under the Principal Act.

The principle applied in Order XIII., Rule 4, is here still further extended to actions for *unliquidated* damages. The practice is, that, when judgment by default is signed as to part, and issue is joined as to the residue, the jury who try the issue assess the damages as to the whole.

* See the note to Order XIII., Rule 6.

So if there be demurrer to one count and issue is joined as to the residue, the jury who try the issue in fact will assess damages on the demurrer.*

Rule 6.

If the plaintiff's claim be for a debt or liquidated demand, and also for detention of goods and pecuniary damages, or pecuniary damages only, and the defendant makes default as mentioned in Rule 2, the plaintiff may enter final judgment for the debt or liquidated demand, and also enter interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in Rule 4.

This is Rule 6 of Order XXVI. of the Rules of Court, drawn up in 1874, under the Principal Act.

A joinder of liquidated and unliquidated demands in the same action is here contemplated. Each is to be dealt with separately, as if there were two distinct actions. In the case of the claim for unliquidated damages, a writ of inquiry or reference is necessary.

Rule 7.

In an action for the recovery of land, if the defendant makes default as mentioned in Rule 2, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land, with his costs.

This is Rule 7 of Order XXVI. of the Rules of Court, drawn up in 1874, under the Principal Act.

See as to this action Order XIX., Rule 15, which introduces a new practice by sanctioning statements of defence in this action. Under section 178 of the Common Law Procedure Act, 1852, there could be no "default in pleading" in the case of ejectment.

Rule 8.

Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract upon a writ for the recovery of land, if the defendant

* See *Codrington v. Lloyd*, 1 P. and D. 157; 2 Archbold's Practice, p. 990.

makes default as mentioned in Rule 2, or, if there be more than one defendant, some or one of the defendants make such default, the plaintiff may enter judgment against the defaulting defendant or defendants, and proceed as mentioned in Rules 4 and 5.

This is Rule 8 of Order XXVI. of the Rules of Court, drawn up in 1874, under the Principal Act.

Order XVII., Rule 2, sanctions joining in one action claims for mesne profits, arrears of rent, and damages for breach of contract in relation to the same premises, with ejectment.

Similar provisions to those contained in this Rule are contained in Order XIII., Rule 8, in the case of default of appearance.

The principle of Order XIII., Rule 4, is applied in this Rule.

As the claims indorsed on the writ are for unliquidated damages, an inquiry into their *quantum* is necessary. (See note to Rule 5 of this Order.)

Rule 9.

In Probate actions, if any defendant make default in filing and delivering a defence or demurrer, the action may proceed, notwithstanding such default.

This is Rule 9 of Order XXVI. of the Rules of Court, drawn up in 1874 under the Principal Act.

See Order XIII., Rule 9, in which the same principle is applied.

Rule 10.

In all other actions than those in the preceding Rules of this Order mentioned, if the defendant makes default in delivering a defence or demurrer, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled to.

This is Rule 10 of Order XXVI. of the Rules of Court, drawn up in 1874, under the Principal Act.

As to motion for judgment, see Order XL.

Rule 11.

Where, in any such action as mentioned in the last preceding Rule, there are several defendants, then, if one of such defendants make such default as aforesaid, the

plaintiff may either set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants.

This is Rule 11 of Order XXVI. of the Rules of Court, drawn up in 1874, under the Principal Act.

See Order XIII., Rule 4, as to default by one of several defendants, and Rules 3, 5 and 8 of this Order. As to motion for judgment see Order XL.

Rule 12.

If the plaintiff does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading, or a demurrer, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and the statements of fact in the pleading last delivered shall be deemed to be admitted.

This is Rule 12 of Order XXVI. of the Rules of Court, drawn up in 1874, under the Principal Act.

This is new.

Rule 13.

In any case in which issues arise in an action other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the opposite party may apply to the Court or a Judge for such judgment, if any, as upon the pleadings he may appear to be entitled to. And the Court may order judgment to be entered accordingly, or may make such other order as may be necessary to do complete justice between the parties.

This is Rule 13 of Order XXVI. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule carries out the recommendation of the Judicature Commission * :—"We think that either"—(? any)—"party should be at liberty to apply at any time, either before or after pleading, *for such order as he may, upon the admitted facts, be entitled to.*"

* First Report, p. 12.

Rule 14.

Any judgment by default, whether under this Order or under any other of these Rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit.

This is Rule 14 of Order XXVI. of the Rules of Court, drawn up in 1874, under the Principal Act.

A regular judgment may be set aside at Common Law upon an affidavit of merits, stating that "the defendant has a good defence to this action upon the merits." * It is usually set aside upon such terms as will place the plaintiff as nearly as possible in the same situation as if the action had proceeded in its regular course.† In ordinary cases it is almost a matter of course to grant the application for setting aside a judgment.‡ It is, however, wholly discretionary with the Court to grant or not to grant it.

ORDER XXX.

PAYMENT INTO COURT IN SATISFACTION.

Rule 1.

Where any action is brought to recover a debt or damages, any defendant may at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the Court or a Judge at any later time, pay into Court a sum of money by way of satisfaction or amends. Payment into Court shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified therein.

This is Rule 1 of Order XXVII., of the Rules of Court, drawn up in 1874, under the Principal Act.

"Action to recover a debt or damages." This is a different definition of the cases in which money may be paid into Court from that contained in s. 70 of the Common Law Procedure Act, 1852.

The words "any action for damages," would, of course, include actions for assault and battery,§ false imprisonment, libel, slander, malicious arrest or prosecution, or debauching of the plaintiff's daughter or servant,|| which are expressly excepted by s. 70 of the Common Law Procedure Act, 1852. (The exception of libel did not extend to cases of libels in newspapers, 6 & 7 Vict., c. 96, s. 2.)

* *Lane v. Isaacs*, 3 Dowl. 652.

† See *Anon*, 3 Doug. 431; *Smith v. Blundell*, 1 Chit. Rep. 226.

‡ *Wood v. Cleveland*, 2 Salk., 518.

§ An assault upon the plaintiff's son was held not to be within the exception, *Newton v. Holford*, 2 D. and L., 654.

|| Actions for *crim. con.*, which are also excepted, were abolished by the 20 & 21 Vict., c. 85, s. 59.

"At any time after service of the writ, and before the time of delivering his defence." See the note to the next Rule.

"At any later time." This may create a difficulty if the plaintiff accepts the payment in satisfaction of his claim, as, under Rule 4, he can only do so "before reply."

Payment into Court "as amends" was allowed at a time when such payment could not be entered upon the record by way of plea.*

"Payment into Court *shall* be pleaded in the defence." This is, of course, unnecessary, when the payment is *before* defence.

Rule 2.

Such sum of money shall be paid to the proper officer, who shall give a receipt for the same. If such payment be made before delivering his defence, the defendant shall thereupon serve upon the plaintiff a notice that he has paid in such money, and in respect of what claim, in the Form No. 5 in the Appendix (B) hereto.

This is Rule 2 of Order XXVII., of the Rules of Court. drawn up in 1874, under the Principal Act, "Appendix (B)," being substituted for "Schedule B," in order to bring the Rule into harmony with the present Act.

The first clause of this Rule is taken from the first part of s. 72 of the Common Law Procedure Act, 1852.

The present order introduces an entirely new practice of noticing the plaintiff of payment into Court *before the delivery of the defence*. The *modus operandi* under the former practice is thus described by Mr. Archbold:—"Prepare a plea of payment into Court. Take the plea to the Master's office. The officer there will give you an authority to Messieurs Hoare, bankers, in Fleet Street, to receive the money. The clerk at Messieurs Hoare's will give you a printed receipt. Take such receipt and the plea to the Master's office and the clerk there will sign a receipt in the margin of the plea for the money paid into Court. Pay such clerk the proper fee† upon payment of money into Court. Deliver the plea to the plaintiff's attorney or agent, as in ordinary cases."‡ The same (or a similar) method of proceeding will, of course, still be necessary, where the payment into Court is made "at the time of delivering the defence" (Rule 1). (See Notanda.)

No form, it will be seen, is given of a *plea* of payment into Court. The notice, however, closely follows the form of plea given in s. 71 of the Common Law Procedure Act, 1852, and it is apprehended that that form, *mutatis mutandis*, will be still sufficient.

Rule 3.

Money paid into Court as aforesaid shall be paid out

* *i.e.*, before 3 & 4 Wm. IV., c. 42, s. 21. See *Tattersall v. Parkinson*, 16 M. & W. pp. 752, 759; 1 Wms. Saund., 33 g.

† Sec 7 Wm. IV. & 1 Vict., c. 30, s. 9.

‡ Archbold's Practice, p. 1364.

to the plaintiff, or to his solicitor on the written authority of the plaintiff. No affidavit shall be necessary to verify the plaintiff's signature to such written authority, unless specially required by the officer of the Court.

This is Rule 3 of Order XXVII., of the Rules of Court, drawn up in 1874, under the Principal Act.

The first clause of this Rule is taken from the latter part of section 72 of the Common Law Procedure Act, 1852, the words "unless otherwise ordered by a Judge" being added. The second clause of the Rule is taken from Reg. Gen. Hil. T., 1853, Rule II, the words "officer of the Court" being substituted for "Master."

Rule 4.

The plaintiff, if payment into Court is made before delivering a defence, may within four days after receipt of notice of such payment, or if such payment is first stated in a defence delivered then, may before reply, accept the same in satisfaction of the causes of action in respect of which it is paid in; in which case he shall give notice to the defendant in the Form No. 6 in Appendix (B) hereto, and shall be at liberty, in case the sum paid in is accepted in satisfaction of the entire cause of action, to tax his costs, and in case of non-payment within forty-eight hours, to sign judgment for his costs so taxed.

This is Rule 4 of Order XXVII. of the Rules of Court drawn up in 1874 under the Principal Act, "Appendix B" being substituted for "Schedule B," in order to adapt the Rule to the present Act.

The Rule is taken from section 73 of the Common Law Procedure Act, 1852.

The 73rd section, however, only contemplated an acceptance of the sum paid into Court "*after* the delivery of a plea of payment of money into Court, but before reply; the present Rule contemplates such an acceptance either *before* a defence is delivered, or after it.

"May before reply."* See notes to Rules 1 and 2 of this Order.

It will be seen that the payment may still be accepted in satisfaction of part of the plaintiff's claim, as well as of the whole.

The notice to the defendant is new.

ORDER XXXI.

DISCOVERY AND INSPECTION.

Rule 1.

The plaintiff may, at the time of delivering his

* Query. What if the payment is made *after* the reply?

statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may, at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time, by leave of the Court or a Judge, deliver interrogatories in writing for the examination of the opposite party or parties, or any one or more of such parties, with a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose.

This Rule is a more elaborate statement of the principle laid down in the first part of Rule 25 of the Principal Act. "Subject to any Rules of Court, a plaintiff in any action shall be entitled to exhibit interrogatories to and obtain a discovery from any defendant, and any defendant shall be entitled to exhibit interrogatories to and obtain discovery from a plaintiff or any other party."

The Rule is copied from Rule 1 of the XXVIIIth Order of the Rules of Court drawn up in 1874 under the Principal Act.

Mr. Day recommended* that, when the Judge had decided that some interrogatories should be put, it should be left to the party interrogating to put, at his own cost, such questions as he might be advised, instead of taking up the valuable time of a Judge at Chambers in ascertaining amid the hurry and confusion, first, not merely whether *any* interrogatories at all ought to be delivered, but also whether *the particular* interrogatories were themselves severally proper; a practice which also involved "parading before one's opponent the hoped-for results of questions." He considered that this would be "more convenient, and useful, and practice, and more congruous with that *in consimili casu* in Chancery."

The Legislature has, *pro tanto*, improved upon Mr. Day's suggestion by *doing away altogether* with the necessity for a Judge's order, when the interrogatories are delivered with the statement of claim, or of defence, or not later than the close of the pleadings. The intervention of the Court or of a Judge need not in future be invoked except when it is sought to administer interrogatories before or after the above-mentioned limits of time. By the provision that only one set of interrogatories can be delivered to the same party without an order, and also by the next Rule a check will be put upon any abuse of the privilege accorded by the present Rule.

"With a note at the foot thereof." See the form No. 7 in Appendix (B).

Rule 2.

The Court in adjusting the costs of the action shall, at the instance of any party, inquire or cause inquiry to be made

* Common Law Procedure Acts, pp. 308, 309.

into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing master or of the Court or Judge that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault.

This Rule is a re-enactment of the second part of Rule 25 of the Principal Act.

The Rule is founded on the principles laid down in Order XL., Rules 9 and 10 of the Consolidated Orders of the Court of Chancery.

See the note to Rule 1.

Rule 3:

Interrogatories may be in the Form No. 7 in Appendix (B) hereto, with such variations as circumstances may require.

This is Rule 2 of the XXVIIIth Order of the Rules of Court drawn up in 1874 under the Principal Act, "Appendix B" being substituted for "Schedule B," in order to adapt the Rule so the present Act.

The form is taken from the one in use in Chancery practice, as will be seen on comparing it with the forms given in Daniel's Chancery Forms, p. 359, and with Chitty's Common Law Forms, p. 168.

Rule 4.

If any party to an action be a body corporate or a joint-stock Company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

This is Rule 3 of the XXVIIIth Order of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule is copied from section 57 of the Common Law Procedure Act, 1852, so far as "bodies corporate" are concerned. It was held in *McKewan P. O. v. Rolt*, 4 H. and N., 738, that the words of that enactment, "any of the officers of a body corporate" extended to the public officer of a joint stock bank under 7 Geo. IV., c. 46. It will be seen that by the present Rule provision is expressly made for administering inter-

rogatories "to any member or officer" of "a joint stock company, whether incorporated or not." Provision is also made for administering interrogatories "to any member or officer" of "any other body of persons empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person."

Rule 5.

Any party called upon to answer interrogatories, whether by himself or by any member or officer, may, within four days after service of the interrogatories, apply at chambers to strike out any interrogatory, on the ground that it is scandalous or irrelevant, or is not put *bonâ fide* for the purposes of the action, or that the matter enquired after is not sufficiently material at that stage of the action, or on any other ground. And the Judge, if satisfied that any interrogatory is objectionable, may order it to be struck out.

This is a more elaborate statement of the principle laid down in the second portion of the first part of Rule 25 of the Principal Act:—"Any party shall be entitled to object to any interrogatory on the ground of irrelevancy, and the Court or a Judge, if not satisfied that such interrogatory is relevant to some issue in the cause, may allow such objection."

The Rule is copied from Rule 4 of the XXVIIIth Order of the Rules of Court, drawn up in 1874 under the Principal Act.

The Rule is founded on the principles laid down in Order XXXV., Rule 60, and Order XVI., Rule 21 of the Consolidated Orders of the Court of Chancery. See also Order XXVII., Rule 1, of this Schedule.

Rule 6.

Interrogatories shall be answered by affidavit to be filed within ten days, or within such further time as a Judge may allow.

This is Rule 6 of the XXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act. Section 51 of the Common Law Procedure Act, 1854, requires the opposite party "within ten days, to answer the questions in writing, by affidavit to be filed." The present Rule gives a Judge power to vary the time.

Rule 7.

An affidavit in answer to interrogatories shall, unless otherwise ordered by a Judge, if exceeding three folios, be

printed, and may be in the Form No. 8 in Appendix (B) hereto, with such variations as circumstances may require.

This is Rule 6 of the XXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act, "Appendix B." being substituted for "Schedule B," in order to adapt the Rule to the Present Act.

The form is similar, *mutatis mutandis*, to that given in Archbold's Forms, p. 171.

By Rule 11 of the Order of March 6, 1860, the Court of Chancery enjoins that "where a plaintiff is required to answer interrogatories, he is to get his answer printed."

The present Rule excepts affidavits containing less than 3 folios (or 216 words.)

Rule 8.

Any objection to answering any interrogatory may be taken, and the ground thereof stated in the affidavit.

This is Rule 7 of the XXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act, "mentioned in the preceding Rule," being expunged as unnecessary.

This was the Rule embodied in the practice at Common Law, under the Common Law Procedure Act, 1854, s. 51. The answers were required to follow the order of the interrogatories and answers, and *assign reasons for non-answering* each interrogatory specifically. *Chester v. Wortley*, 18 C. B. 239.

Rule 9.

No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court or a Judge on motion or summons.

This Rule is a re-enactment of the last portion of the first part of Rule 25 of the Principal Act, the words "any affidavit in," being inserted before "answer, and such affidavit," being substituted for "any answer."

The Rule contains a reference to the Chancery Practice of "excepting" to answers to interrogatories, and for the future forbids it.

If the plaintiff in equity, upon due examination of the defendant's answer to his interrogatories, found that it contained scandalous matter or was insufficient, he might have filed "exceptions" to it, stating the particular points to which he took exception. Separate exceptions were required to separate answers. The exceptions were heard in open Court, and if allowed the defendant had to answer further. After a third insufficient answer the defendant stood committed for contempt.

The defendant might also have excepted to the plaintiffs' answer to *his* interrogatories.*

"Determined by the Court or a Judge." See the next Rule.

* See as to, "Exceptions to answers," Daniel's Chancery Practice, Chap. XVII. section 4, and Chap. XXXIV, section 1.

Rule 10.

If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a Judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer, or answer further, either by affidavit or by *vivâ voce* examination, as the Judge may direct.

This is Rule 8 of the XXVIIIth Order of the Rules of Court drawn up, in 1874, under the Principal Act. See the 53rd section of the Common Law Procedure Act, 1854, as to the *vivâ voce* examination of the interrogated party.

"Answer further." This like "exceptions to answer," is an expression borrowed from Chancery Practice. The "further answer" extended only to interrogatories which had not been answered or answered sufficiently previously. Repetition of anything contained in the former answer was regarded as "impertinent," and the defendant might have been made to pay the costs occasioned by the introduction of the impertinent matter.*

The present Rule follows the Common Law Practice, although it uses Chancery phrases.

By s. 53 of the Common Law Procedure Act, 1854, "in case of omission, without just cause, to answer sufficiently written interrogatories, it shall be lawful for the Court or a Judge, at their or his discretion, to direct an *oral examination* of the interrogated party, as to such points as they or he may direct, before a Judge or a Master. An application under this section should be made at chambers in the first instance."† The present Rule gives the party interrogating the alternative of applying for a further *affidavit* in lieu of an *oral* or *vivâ voce* examination of his opponents.

Rule 11.

It shall be lawful for the Court or a Judge at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such action or proceeding, as the Court or Judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

* 15 & 16 Vict., c. 86, s. 17. See as to "Further answers," Daniel's Chancery Practice, chap. XVII., section 5.

† *Bender v. Zimmerman*, L. J. 29, Ex. 244.

This Rule is a re-enactment of Rule 27 of the Principal Act.

The Rule is copied from s. 86 of the Chancery Amendment Act, 1852, (15 and 16 Vict., c. 86). The section only applies to production by a defendant. S. 20 of the same Act applies to production by plaintiffs, but only after answer by the defendant. The present Rule applies to "production by any party," at any time during the pendency of any action or proceeding. "Production on oath" means production accompanied by affidavit. A form of such an affidavit is given in the Schedule to the regulations as to business at Chancery Chambers of August 8th, 1857, and will be found set out in full at p. LIX. of Morgan and Chute's Chancery Acts and Forms (4th edition).

Rule 12.

Any party may, without filing any affidavit, apply to a Judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question in the action.

This is Rule 9 of the XXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The Common Law enactment as to the "discovery of documents" is section 50 of the Common Law Procedure Act, 1854, to which and to Mr. Day's notes* upon it, reference should be made.

This Rule is taken from that section of the Common Law Procedure Act, 1852, with the alteration, that no affidavit is required. "Discovery on oath" in this section is equivalent to "production on oath" in Rule 11. Indeed, the two Rules are identical in their object; but the jurisdiction of the Court of Chancery under the Chancery Law Amendment Act, 1852, was not ousted by, but concurrent with, that of the Common Law Courts, under the Common Law Procedure Act, 1852.

Rule 13.

The affidavit to be made by a party against whom such order as is mentioned in the last preceding Rule has been made, shall specify which, if any, of the documents therein mentioned, he objects to produce, and it may be in the Form No. 9 in Appendix (B) hereto, with such variations as circumstances may require.

This is Rule 10 of the XXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act, "Appendix B," being substituted for "Schedule B," in order to adapt the Rule to the present Act.

"Such order as is mentioned in the last preceding Rule." It is not a

* PP. 295-304, 4th edition.

little curious, as illustrating what a remarkable mosaic the present Schedule is, that the form No. 9, in Appendix (A), hereto is copied *verbatim* from the form prescribed, as we have seen, to be used under sections 18 and 20 of the Chancery Amendment Act, 1852, and would therefore appropriately belong to Rule 11 of this Schedule, which is copied from that enactment!

Rule 14

Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice.

This Rule is a re-enactment of Rule 26 of the Schedule to the Principal Act.

See note to Rule 18 of this Order, *infra*.

By Order XIX., Rule 24, it is sufficient in any pleading to state the effect of any material document as briefly as possible. The present Rule supplements that Rule very usefully, by enabling the opposite party to *inspect* the document so referred to by a simple interchange of notices between the parties. In case the party noticed to produce the document for inspection, omits or objects to give inspection, the opposite party may, under Rule 17 of this Order, *infra*, apply to a judge for an order for inspection.

It is a rule of the Court of Chancery that a party can only have inspection of documents which relate to his own case.

Rule 15.

Notice to any party to produce any documents referred to in his pleading or affidavits shall be in the Form No. 10 in Appendix (B) hereto.

This is Rule 11 of the XXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act, "Appendix B," being substituted for "Schedule B," in order to adapt the Rule to the present Act.

This notice is, technically speaking, not a notice to produce, but a notice to *inspect*. The expression "notice to produce" was used in the case of a summons in equity to inspect at chambers. See Daniel's "Forms," 1191. The form is probably framed on that model.

Rule 16.

The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice may be in the Form No. 11 in Appendix (B) hereto, with such variations as circumstances may require.

This is Rule 12 of the XXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act, "Rule 13" and "Appendix B," being substituted for "Rule 10" and "Schedule B," in order to adapt the Rule to the present Act.

The form of notice states that the documents can be inspected at the office of the solicitor of the party. "The Court of Chancery," Mr. Daniel observes,* "now usually orders the production at the place of business of the party's solicitors."

Rule 17.

If the party served with notice under Rule 15 omits to give such notice of a time for inspection, or objects to give inspection, the party desiring it may apply to a Judge for an order for inspection.

This is Rule 13 of the XXVIIIth Order of the Rules of Court drawn up in 1874 under the Principal Act, "Rule 15" being substituted for "Rule 11," in order to adapt the Rule to the present Act.

* Daniel's Chancery Practice, p. 1,696.

This is the first appearance of a Judge upon the scene in this new practice of obtaining inspection.

The great advantage of the new system of inspection is, that an application for an order to inspect, either to the Court or a Judge, is unnecessary. The proceeding is a friendly one *inter partes*, conducted by a series of notices on either side. It is not until the party noticed to give inspection omits or refuses to give it, that it becomes necessary to have recourse to a judge. This is a decided improvement on s. 6 of Lord Brougham's Evidence Act (14 & 15 Vict., c. 99), s. 50 of the Common Law Procedure Act, 1854, and ss. 18 & 20 of the Chancery Amendment Act, 1852, all of which require an application to the Court or to a Judge at Chambers for an order to inspect in the first instance.

Rule 18.

Every application for an order for inspection of documents shall be to a Judge; and except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.

This is Rule 14 of the XXVIIIth Order of the Rules of Court drawn up in 1874, under the Principal Act.

This Rule is very obscure. Frequently in these Rules the first sentence of a Rule is a mere repetition, in slightly altered phraseology, of the last sentence of the preceding one. Let us hope that such is the case in the present instance. If the present Rule is to be considered as incorporated with Rule 14, the benefits of the new practice will be very slight indeed. In fact, Rules 14 and 18, taken together, would be almost equivalent to a re-enactment of s. 6 of the 14 & 15 Vict., c. 99. But there is no application for an "order for inspection" mentioned in Rule 14, and as the documents respecting which notice is to be given in Rule 14 fall within one of the exceptions of Rule 18, it would not be necessary for the party giving the notice to file an affidavit. To what does Rule 18 apply? Does it apply to Rule 12? The allusion to an application to a judge would then be a mere tautology, and the "documents disclosed" under Rule 12 are expressly excepted from the provision that an affidavit is necessary. Does Rule 18 apply to Rule 11? In the Court of Chancery, from whose Orders that Rule is copied, no affidavit was necessary in support of a summons to inspect documents,* and it would be strange if the Supreme Court in new practice were less liberal.

* *Rochdale Company v. King*, 15 Beav. 11. See *Parkinson v. Chambers*, 1 K. & J., 72.

Rule 19.

If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a Judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

This is Rule 15 of the XXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This is new.

Rule 20.

If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly.

This is Rule 16 of Order XXVIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

Under s. 51 of the Common Law Procedure Act, 1854, any party omitting, without just cause, sufficiently to answer all questions as to which discovery might be sought was to be deemed to have committed a contempt of Court and be liable to be proceeded against accordingly, *i.e.*, to be attached (1 Wm. IV, c. 22., s. 5).

Attachment for contempt was also the punishment in the Court of Chancery.* In Chancery also where an order had been made that the defendants' time for answering should be extended until after the production by the plaintiff of a document stated in the Bill, and the plaintiff

* Daniel's Chancery Practice, p. 1,699.

neglected to produce the document, it was, on the defendants' motion, ordered that the plaintiff should produce the document within a limited time, or that in default *the Bill should be dismissed with costs. Princess of Wales v. Lord Liverpool*, 3 Swaust. 567.

As to striking out the defence, see Order XXVII., Rule 1, and the note thereto.

Rule 21.

Service of an order for discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order.

This is Rule 17 of Order XXVIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

Rule 22.

A solicitor upon whom an order against any party for discovery or inspection is served under the last Rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment.

This is Rule 18 of the XXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

Rule 23.

Any party may, at the trial of an action or issue use in evidence any one or more of the answers of the opposite party to interrogatories without putting in the other : Provided always, that in such case the Judge may look at the whole of the answers, and if he shall be of opinion that any other of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in.

This is Rule 19 of the XXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act. This Rule is rather out of place. It would have followed more naturally Rule 10 of this Order, *supra*.

ORDER XXXII.

ADMISSIONS.

Rule 1.

Any party to an action may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the statement of claim, defence, or reply of any other party.

This Rule is a re-enactment of the first part of Rule 39 of the Principal Act.

"It is an essential principle of pleading at Common Law that whatever is not denied is admitted." (Bullen and Leake's "Precedents," p. 436 n.). Where default is made in pleading, the statement of fact in the pleading last delivered is, by Order XXIX. of the present Act, to be "deemed to be *admitted*." See also Order XXII., Rule 4, as to the power to inflict extra costs for refusal to admit allegations of fact which ought to have been admitted.

Admissions might have been made by parties in the Court of Chancery by agreement or otherwise.*

See the First Report of the Judicature Commission, p. 14.

Rule 2.

Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the Court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the Taxing Officer, a saving of expense.

This Rule is a re-enactment of the second part of Rule 39 of the Principal Act.

The Rule is copied *verbatim* from the Common Law Procedure Act, 1852, section 117, except that "hearing" is inserted before "trial," "Court" is substituted for "Judge," and "Taxing-officer" for "Master."

The words of this enactment are very wide, including every document which a party means to adduce in evidence, and not merely documents in his custody or control (*Rutter v. Chapman*, 8 M. & W. 338), and the

* See Daniel's Chancery Practice, c. xxii, s. 1.

Court will rather enlarge than restrict the provisions of the section (per Alderson, B. in *Rutter v. Chapman*, *ubi supra*).

The admission is to be made "saving all just exceptions." A party, *e.g.*, admitting his handwriting to a bill, is not precluded from objecting to its admissibility in evidence on account of its being unstamped (*Vane v. Whittington*, 2 Dowl., N. S., 757).

No time is specified for giving the notice to admit, but it has been considered that it must be given *a reasonable time before the trial*.*

Where a party necessarily called as a witness to prove some other part of the case, can prove the documents, the omission of a notice to admit will be excusable, on the ground mentioned in the Rule, that it is "a saving of expense."

An admission once formally made will bind the party making it, even on a new trial.†

Rule 3.

A notice to admit documents may be in the Form No. 12 in Appendix (B) hereto.

This is Rule 1 of the XXIXth Order of the Rules of Court drawn up in 1874 under the Principal Act, "Appendix B" being substituted for "Schedule B," in order to adapt the Rule to the present Act.

The form No. 12 in Appendix (B) is copied *verbatim* from Reg.-Gen., Hil. T., 1853, Rule 29, including the Schedules of documents.

Rule 4.

An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents, and annexed to the affidavit, shall be sufficient evidence of such admissions.

This is Rule 2 of the XXIXth Order of the Rules of Court drawn up in 1874, under the Principal Act.

This Rule is copied from the Common Law Procedure Act, 1852, section 118, "solicitor" being substituted for "attorney in the cause."‡

ORDER XXXIII.

INQUIRIES AND ACCOUNTS.

The Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may

* See *Tynn v. Billingsley*, 2 Dowl., 310.

† *Doe v. Bird*, 7 C. & P. 6.

‡ See Day's Common Law Procedure Acts, 4th edn., p. 140. *Doe Tindal v. Roe*, 5 Dowl., 420; *Chaplin v. Levy*, 9 Ex., 531.

appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

This Rule is a re-enactment of Rule 42 of the Principal Act.

It is provided by the 66th section of the Principal Act that the Court or a Judge may, in any cause or matter pending in the High Court, order that any accounts may be taken and inquiries made in the office of or by any District Registrar.

This Order is copied, nearly *verbatim*, from the recommendations of the Judicature Commission:—*

"The Judge should also be empowered at any time, on summary application in Chambers or elsewhere, to direct, if he thinks fit, any necessary inquiries or accounts, notwithstanding it may appear that there is some special or further relief sought, or some special matter to be tried as to which it may be proper that the suit should proceed in the ordinary manner."

"At any stage in the proceedings." The plaintiff in Equity was empowered by Order XX. of the Consolidated Orders to "move the Court on notice," at any time *after the defendant had appeared*, that preliminary accounts and inquiries should be taken; and it was held that they might be ordered though the cause was set down for hearing.†

The accounts and inquiries were ordered "without prejudice to any question in the cause," but it was necessary that they should be beneficial to the parties not competent to consent thereto, and that it should be consented to by any of defendants competent to consent who had not put in their answer, and that they should be consented to as being proper to be made upon the statements contained in the answers of the defendants who had answered. The new practice is not hampered by any of these restrictions. The accounts and inquiries may be ordered, as we have seen, "at any stage" the Court or Judge may order them without any motion, or they may be ordered at the instance of either party; and no consents, either express or constructive, are required.

ORDER XXXIV.

QUESTIONS OF LAW.

Rule 1.

The parties may, after the writ of summons has been issued, concur in stating the questions of law arising in the action in the form of a special case for the opinion of the Court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to

* First Report, p. 11.

† *Strother v. Dutton*, 10 Sim., 288.

enable the Court to decide the questions raised thereby. Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial.

The heading of the following Rules is taken from the heading of the corresponding Rules of the Rules of Court of 1874, drawn up under the Principal Act, with the omission of the words "without pleadings."

This Rule is Rule 1 of Order XXX. of those Rules of Court.

The Rule is founded, partly on the Common Law Procedure Act, 1852, ss. 46, 47, and 48; partly on Sir George Turner's Act, 13 and 14 Vict., c. 35; partly on the Reg. Gen. Hil T. 1862.

Special cases on points of law were first allowed to be stated at Common Law by the 3 and 4 Wm. 4, c. 42, s. 25; but only "after issue joined;" the 46th section of the Common Law Procedure Act, 1852, was, as stated by Mr. Archbold,* "an improvement upon this;" "for," he adds, "now the parties may have the special case *without pleadings*, thereby saving the expense to them, as well as any risk of being defeated by their not properly raising the question of law to be decided."

By s. 46 of the Common Law Procedure Act, 1852, it is enacted that "the parties may, *after writ issued*, and before judgment, by consent and order of a judge, state any question or questions of law in a special case for the opinion of the Court, without any pleadings. It will be seen that the present Rule follows this enactment in requiring that before a special case under the Rule is stated, an action must have been commenced.

It is provided by the Reg. Gen. Hil T., 1862, that "every special case set down in any of the Superior Courts of Common Law shall be divided into paragraphs, *which, as nearly as may be, shall be confined to a distinct portion of the subject*, and every paragraph shall be numbered consecutively." The present Rule enacts the provisions of this Rule: with the omission of the words in italics, which however, it would be as well for the draughtsman to pay heed to.

It will be remembered that by Order XIX., Rule 4, it is provided that "every pleading shall contain, as concisely as may be, a statement of the material facts, such statement being divided into paragraphs, numbered consecutively, and *each paragraph containing, as nearly as may be, a separate allegation*."

The rest of the present Rule is copied, almost *verbatim*, from Sir George Turner's Act (13 and 14 Vict., c. 35) s. 1. That Act enabled, however, parties interested in questions cognizable in the Court of Chancery to concur in stating a special case for the opinion of that Court without filing any Bill. The special case was to be filed, nevertheless, "in the same manner as Bills are filed," and defendants might appear to it "in the same manner as defendants appear to Bills."†

* Archbold's Practice, Part III., chap. II., p. 899.

† 13 and 14 Vict., c. 35, s. 10.

Rule 2.

If it appear to the Court or a Judge, either from the statement of claim or defence or reply or otherwise, that there is in any action a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a Referee or an Arbitrator, the Court or Judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or Judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

This Rule is a re-enactment of Rule 24 of the Principal Act.

Questions of law are constantly raised *in the course of trials*, and decided off-hand by the presiding judge. The present Rule provides a more formal method of deciding these questions "before any evidence is given or any question of fact is tried," if they strike the mind of the judge on a perusal of the pleadings.

The words "before any evidence is given or question of fact is tried" seem to point to an application by summons at Chambers under this Rule, although there is nothing said expressly in the Rule about any such application. The form of application at Chambers would probably be a summons to the opposite party to *show cause why the action should not be stayed*, until the question of law has been decided. The Judge knew nothing formerly of the pleadings till he came into Court and heard them, not read, but concisely summarised by the junior counsel who "opened" them. It would have been almost impossible for the most quick-witted of Judges to gather from the cursory statement of the counsel "opening the pleadings" whether there was any question of law involved in the case or not. But in future a copy of the whole of the pleadings is to be furnished to the Judge.

In criminal cases it is usual for the Judge to peruse the indictments before coming into Court, so as to enable him to give instructions to the Grand Jury whether to find a true Bill or no Bill in any case.

"Before any reference is made to a Referee." The Judge may, by section 57 of the Principal Act, order the question of fact to be tried by a Referee "*at any time*."

Rule 3.

Every special case shall be printed by the plaintiff, and signed by the several parties or their solicitors, and

shall be filed by the plaintiff. Printed copies for the use of the Judges shall be delivered by the plaintiff

This is Rule 2 of the XXXth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

By the Additional Rules of the 12th of August, 1875, Order IV., it is provided, that the present Rule "shall apply to a special case pursuant to the Act of 13 and 14 Vict., c. 35." Prior to that Order there do not appear to have been any instructions as to printing special cases under that Act.

Rule 4.

No special case in an action to which a married woman, infant, or person of unsound mind is a party shall be set down for argument without leave of the Court or a Judge, the application for which must be supported by sufficient evidence that the statements contained in such special case, so far as the same affect the interest of such married woman, infant, or person of unsound mind, are true.

This is Rule 3 of the XXXth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is founded on sections 11 and 15 of the 13 and 14 Vict., c. 35. The words, "the application" down to "true" are copied *verbatim* from s. 11. The Rule, however, differs from the statute in this that the leave may be obtained by *summons at chambers*: the application for leave under the statute must have been made *in Court*—(*Sidebottom v. Watson*, 1 W. R. 229).

Rule 5.

Either party may enter a special case for argument by delivering to the proper officer a memorandum of entry, in the Form 13 in Schedule (B) hereto, and also if any married woman, infant, or person of unsound mind be a party to the action, producing a copy of the order giving leave to enter the same for argument.

This is Rule 4 of the XXXth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

ORDER XXXV.

PROCEEDINGS IN DISTRICT REGISTRIES.

Rule 1.

Where an action proceeds in the District Registry, all proceedings, except where by these Rules it is otherwise provided, or the Court or a Judge shall otherwise order, shall be taken in the District Registry, down to and including the entry for trial of the action or issues therein ; or if the plaintiff is entitled to enter final judgment or to obtain an order for an account by reason of the default of the defendant, then down to and including such judgment or order ; and such judgment or order as last aforesaid shall be entered in the District Registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in London. Where the writ of summons is issued out of a District Registry and the plaintiff is entitled to enter interlocutory judgment under Order XIII., Rule 6, or where the action proceeds in the District Registry and the plaintiff is intitled to enter interlocutory judgment under Order XXIX., Rule 4 or 5, in either case such interlocutory judgment, and, when damages shall have been assessed, final judgment shall be entered in the District Registry, unless the Court or a Judge shall otherwise order. Where an action proceeds in the District Registry, final judgment shall be entered in the District Registry unless the Judge at the trial or the Court or a Judge shall otherwise order.

The first clause of this Rule down to the word, "London," is Rule 2 of Order XXXI of the Rules of Court, drawn up, in 1874 under the Principal Act. The rest of the Rule appears for the first time in this Order.

The first clause of the Rule, except the concluding portion of it, is copied *verbatim* from s. 64 of the Principal Act. It was hardly necessary to enact the same thing twice over,* but as this is the course freely

* It will be seen from what follows that the same thing is enacted thrice over.

followed by this Schedule with regard to a vast variety of other enactments, it cannot be looked upon in the light of an inconsistency. The concluding words of the first clause of the Rule:—"And such judgment or order shall be entered in the District Registry in the proper book in the same manner as a like judgment or order in an action proceeding in London would be entered in London," are framed upon the authority of the legislature as expressed in s. 64 of the Principal Act:—"Such proceedings may be recorded in the District Registry *in such manner as may be prescribed by Rules of Court.*" S. 64 also declares that "all such other proceedings in any such action as may be prescribed by Rules of Court shall be taken and may be recorded in the same District Registry." The second and third clauses of this Rule are framed with a view to carrying out this authority.

"Interlocutory judgment," *i.e.*, judgment subject to the finding of a jury under a writ of inquiry as to the *quantum* of damages; Order XIII, Rule 6 gives power to enter such a judgment in default of appearance. Order XXIX, Rules 4 and 5 give power to enter such a judgment in default of pleading. S. 64 of the Principal Act might have been held not to include a case of interlocutory judgment, but a case of final judgment only. Hence this enactment. As the last clause of this Rule originally stood, the words "and the trial takes place elsewhere than in London or Middlesex," preceded the words, "final judgment." The former words were struck out in Committee on the Bill in the House of Commons, on the motion of Mr. Gorst, Q.C., who represented the Lancashire Law Societies. His object was to prevent actions once commenced in Lancashire from being removed to London, but the omission of the words which originally stood in the last clause of the Rule renders the clause a mere repetition of what had been previously enacted by the 64th Section of the Principal Act and by the first clause of the present Rule. As the last clause originally stood, it was intended to provide for the case of an action, technically speaking, "proceeding in a District Registry," not being tried outside the district, elsewhere than in London or Middlesex. Such a case might not seem to come strictly within the first clause of the Rule, just like the case of interlocutory judgment; hence the proposed enactment, which was intended to extend, not to limit, the entering of final judgment in a District Registry.

The following originally formed Rule 1 of this Order, but it was struck out in Committee on the motion of the Attorney General, at the instance of the Provincial Law Societies:—

"For the purpose of these Rules the district of every District Registry in the county of Lancaster shall mean the district thereto assigned by any Order of Her Majesty in Council, and the district of every District Registry elsewhere than in the county of Lancaster, shall mean a circle with a radius of five miles, as the crow flies, from the Registry."

This suggested Rule was rendered unnecessary by the Order in Council of the 12th August, 1875, which as far as District Registries outside Lancashire are concerned, defines the area of each District Registry in terms much more elastic than those specified in the suggested Rule. The area formerly assigned to each District Prothonotary is now the area of each District Registry in Lancashire, and *the area of the district of the local County Court* is the area of the district of each of the other District Registries.

The influential deputation which waited upon the Attorney General from the Provincial Law Societies* pointed out to him that under the

* The writer accompanied this deputation, by request.

suggested Rule the "radius of five miles, as the crow flies," would occasionally cut a house, and even a bed, in two!

Rule 2.

Subject to the foregoing Rules, where an action proceeds in the District Registry the judgment and all such orders therein as require to be entered, except orders made by the District Registrar under the authority and jurisdiction vested in him under these Rules, shall be entered in London, and an office copy of every judgment and order so entered shall be transmitted to the District Registry to be filed with the proceedings in the action.

This is Rule 3 of the XXXIst Order of the Rules of Court drawn up in 1874 under the Principal Act, with the addition of the words, "subject to the foregoing Rules," at the commencement and the omission of the words, "except such judgment or orders for account as mentioned in the last preceding Rule" after the word "except," this exception being included in the words "subject to the foregoing Rules." The word "Rules" has been left standing although the first Rule has been struck out. It should have been altered to the singular number.

Rule 3.

Where an action proceeds in the District Registry all writs of execution for enforcing any judgment or order therein shall issue from the District Registry, unless the Court or a Judge shall otherwise direct. Where final judgment is entered in the District Registry costs shall be taxed in such Registry unless the Court or a Judge shall otherwise order.

The first clause of this Rule is Rule 4 of the XXXIst Order of the Rules of Court drawn up in 1874 under the Principal Act. The second Clause of the Rule is new.

This Rule and the next confer important powers on the District Registrars.

Rule 4.

Where an action proceeds in a District Registry the District Registrar may exercise all such authority and jurisdiction in respect of the action as may be exercised

by a Judge at chambers, except such as by these Rules a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions is precluded from exercising.

This is Rule 5 of the XXXIst Order of the Rules of Court drawn up in 1874 under the Principal Act.

The view of many eminent lawyers that the duties of District Registrars should be purely *ministerial* has, it will be seen by this Rule, not been carried out. The District Registrars will be armed with all the powers of the Masters of the Courts of Common Law. See as to the jurisdiction of such Masters, the Judges' Chambers (Despatch of Business) Act, 30 and 31 Vict., c. 68; the Reg. Gen., Mich. T., 1867, made under the authority of that Act, and Order LIV., Rule 2, of the present Schedule.

The expression "Judges' Chambers" is large enough to include the Chambers of the *Chancery* Judges, and that it does include them is evident from Rule 10 of this Order.

In Order LIV., when it is intended to speak of applications to Common Law Judges at chambers, or to the Masters, these applications are distinguished from other applications at chambers. See Rules 2 and 6 of that Order. The words, however, "in respect of the action" are important; they seem to exclude the jurisdiction *unconnected with actions* exercised by Chancery Judges.

There is no limitation to the jurisdiction of Chief Clerks at chambers, similar to that of the Master's; they can exercise all the jurisdiction of their Judges at chambers. This jurisdiction is very extensive. See 15 and 16 Vict., c. 80; 18 and 19 Vict., c. 134, and Order XXXV. of the Consolidated Orders of the Court of Chancery.

Rule 5.

Every application to a District Registrar shall be made in the same manner in which applications at chambers are directed to be made by these rules.

This is Rule 6 of the XXXIst Order of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule refers to Order LIV., Rule 1, *infra* :—"Every application at chambers, authorised by these Rules, shall be made *in a summary way by summons*."

Rule 6.

If any matter appears to the District Registrar proper for the decision of a Judge, the Registrar may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the Registrar, with such directions as he may think fit.

This is Rule 7 of the XXXIst Order of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule reappears as Order LIV., Rule 3, with the substitution of

“Master” for “District Registrar.” The rule is taken from Reg. Gen., Mich. T., 1867, where, however, the rule applies to the Master.

Rule 7.

Any person affected by any order or decision of a District Registrar may appeal to a Judge ; such appeal may be made notwithstanding that the order or decision was in respect of a proceeding or matter as to which the District Registrar had jurisdiction only by consent. Such appeal shall be by summons within four days after the decision complained of, or such further time as may be allowed by a Judge or the Registrar.

This is Rule 8 of the XXXIst Order of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule reappears as Order LIV., Rule 4, with the substitution of “Master” for “District Registrar.”

The Rule is taken from Reg. Gen., Mich. T., 1867, where, however, it is applied to the Master.

Rule 8.

An appeal from a District Registrar shall be no stay of proceedings unless so ordered by a Judge or the Registrar.

This is Rule 9 of the XXXIst Order of the Rules of Court drawn up in 1874 under the Principal Act.

The Rule reappears as Order LIV., Rule 5, with the substitution of “Master’s decision” for “District Registrar,” and “Master” for “Registrar.”

It is taken from Reg. Gen., Mich. T., 1867, where, however, it is applied to an appeal for the Master’s decision.

Rule 9.

Every District Registrar and other officer of a District Registry shall be subject to the orders and directions of the Court or a Judge as fully as any other officer of the Court, and every proceeding in a District Registry shall be subject to the control of the Court or a Judge, as fully as a like proceeding in London.

This is Rule 10 of the XXXIst Order of the Rules of Court drawn up in 1874 under the Principal Act.

See as to the position of existing officers of the Superior Courts, s. 77 of the Principal Act; as to that of future officers, s. 4 of the same Act.

Rule 10.

Every reference to a Judge by or appeal to a Judge from a District Registrar in any action in the Chancery Division shall be to the Judge to whom the action is assigned.

This is Rule 11 of the XXXIst Order of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule follows the practice of the Court of Chancery, and the practice in the Courts of Common Law is regulated by the Stat. 1 and 2 Vict., c. 45, which enables a Judge of any one of the three Common Law Courts to transact out of Court any business relating to any other of the Common Law Courts in the same manner as if he had been a Judge of the Court to which the business belonged, and this, although such Courts might have no common jurisdiction therein.

Rule 11.

In any action which would, under the foregoing Rules, proceed in the District Registry, any defendant may remove the action from the District Registry as of right in the cases, and within the times, following :—

Where the writ is specially indorsed under Order III, Rule 6, and the plaintiff does not within four days after the appearance of such defendant give notice of an application for an order against him under Order XIV.; then such defendant may remove the action as of right at any time after the expiration of such four days, and before delivering a defence, and before the expiration of the time for doing so :

Where the writ is specially indorsed, and the plaintiff has made such application as in the last paragraph mentioned, and the defendant has obtained leave to defend in manner provided by Order XIV.; then such defendant may remove the action as of right at any time after the order giving him leave to defend, and before delivering a defence, and before the expiration of the time for doing so :

Where the writ is not specially indorsed any de-

defendant may remove the action as of right at any time after appearance, and before delivering a defence, and before the expiration of the time for doing so.

This is Rule 12 of the XXXIst Order of the Rules of Court drawn up in 1874, under the Principal Act. "Order III., Rule 6," being substituted for "section 7 of the Schedule," and "Order XIV." for "Order XIII.," in order to bring the Rule into harmony with the present Act, in the first and second subsections.

Mr. Gorst, Q.C., moved the omission of this and the next Rule, as destroying the privileges conceded by the other Rules of the Schedule to District Registries, and interfering with the vested rights of the suitors of the County Palatine of Lancaster.* A division was called for, but the motion was negatived.

There can be no doubt that these two Rules concede to defendants large powers of removal of actions from District Registries to London; but this, while militating against actions "proceeding" in the District Registries, increases the elasticity of the new procedure generally.

Where the writ is specially endorsed, the process against the defendant is more peremptory than where the writ is not specially endorsed. The defendant on appearance may be called upon by the plaintiff to show cause why the plaintiff should not sign final judgment. By the first subsection of this rule, if the plaintiff neglects to avail himself of this privilege for four days after the defendant's appearance, the defendant may as of right remove the action at the expiration of that period. The plaintiff may, however, avail himself of the privilege of calling upon the defendant to show cause, and the Judge may order that the defendant shall have leave to defend. In this case it is provided by the second subsection of this Rule that the defendant may remove the action, as of right, at any time after the order giving him leave to defend has been made by the Judge. "Such application as in the last paragraph mentioned" does not seem necessarily to mean an application within four days.

In the case of a writ not specially endorsed the defendant's right to remove the action arises immediately on his entering an appearance, he need not wait four days, and he does not want any order for leave to defend.

It will be remembered that if the defendant neither resides nor carries on business within the district in which the action is commenced, he need not even enter an appearance within the district unless he likes. It is only when the defendant either resides *or* carries on business within the district that he is *bound* to appear there. See Order V., Rules 1, 2 and 3; Order XII., Rules 2 and 3.

Rule 12.

Any defendant desirous to remove an action as of right under the last preceding Rule may do so by serving upon the other parties to the action, and delivering to the District Registrar, a notice, signed by himself or his solicitor, to the effect that he desires the action to be removed

* The writer, as a Lancashire member, supported the motion.

to London, and the action shall be removed accordingly : Provided, that if the Court or a Judge shall be satisfied that the defendant giving such notice is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such Court or Judge may order that the action may proceed in the District Registry notwithstanding such notice.

This is Rule 13 of the XXXIst Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The process provided in cases where the defendant removes the action as of right is exceedingly simple.

As to the proviso at the end of the Rule, see Order XII., Rule 5. An application on the part of the plaintiff by summons at chambers would appear to be necessary to obtaining an order that the action shall proceed in the District Registry.

Rule 13.

In any case not provided for by the last two preceding Rules, any party to an action proceeding in a District Registry may apply to the Court or a Judge, or to the District Registrar, for an order to remove the action from the District Registry to London ; and such Court, Judge, or Registrar may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall seem just. Any party to an action proceeding in London may apply to the Court or a Judge for an order to remove the action from London to any District Registry, and such Court or Judge may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall seem just.

This is Rule 14 of the XXXIst Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The object of the Provincial Law Societies was to get the two preceding Rules omitted, and also the words, "in any case not provided for by the last two preceding Rules," at the commencement of this Rule, omitted also. It would then have been necessary for a defendant, desirous of removing an action from a District Registry, to apply *in all cases* for an order to remove it. The Government, however, adhered to the two preceding Rules and to the words at the commencement of this Rule, and the motion to omit them was not pressed to a division.

The second clause of this Rule was a concession to the Provincial Law Societies.

Rule 14.

Whenever any proceedings are removed from the District Registry to London, the District Registrar shall transmit to the proper officer of the High Court of Justice all original documents (if any) filed in the District Registry, and a copy of all entries in the books of the District Registry of the proceedings in the action.

This is Rule 15 of the XXXIst Order of the Rules of Court, drawn up in 1874, under the Principal Act.

See further as to District Registries, sections 60, 61, 62, 63, 64 and 65 of the Principal Act, also section 13, *supra*.

ORDER XXXVI.

TRIAL.

Rule 1.

There shall be no local venue for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he shall in his statement of claim name the county or place in which he proposes that the action shall be tried, and the action shall, unless a Judge otherwise orders, be tried in the county or place so named. Where no place of trial is named in the statement of claim, the place of trial shall, unless a Judge otherwise orders, be the county of Middlesex. Any order of a Judge, as to such place of trial, may be discharged or varied by a Divisional Court of the High Court.

This Rule is a re-enactment of Rule 28 of the Principal Act.

The venue is local when the cause of action stated in the declaration could, by possibility, and in its nature, have reference to a particular locality only.*

The venue of all actions will henceforth be *transitory*. The learning on the subject of "venue" will be found in the notes to *Mostyn v. Fabrigas* in Smith's Leading Cases, 623.

"Unless a Judge otherwise orders." The Judicature Commissioners, in their First Report (p.17), recommended that "all local venues in civil actions should be abolished, leaving it to the Court or a Judge to control the choice of the plaintiff, in case an inconvenient venue should be chosen."

* Broom's Comm. p. 164, 4th edn.

"Order of a Judge." By Reg. Gen. Hil. T., 1853, "no venue shall be changed without a special order of the Court or a Judge, unless by the consent of the parties."

Rule 2.

Actions shall be tried and heard either before a Judge or Judges, or before a Judge sitting with assessors, or before a Judge and Jury, or before an official or special Referee, with or without assessors.

This Rule is a re-enactment of Rule 30 of the Principal Act.

As to official and special Referees see sections 57, 58, and 59 of the Principal Act, and Rules 30 to 34 of this Order, *infra*.

As to trial before a Judge sitting *alone*, see section 1 of the Common Law Procedure Act, 1854. As to trial before a Judge sitting with *assessors* see section 56 of the Principal Act.

The Judicature Commissioners recommended that any question to be tried should be capable of being tried by a *Judge*, a *Jury*, or a *Referee*.*

Rule 3.

Subject to the provisions of the following Rules, the plaintiff may, with his reply, or at any time after the close of the pleadings, give notice of trial of the action, and thereby specify one of the modes mentioned in Rule 2; and the defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a Court or Judge may allow, to the effect that he desires to have the issues of fact tried before a Judge and Jury, be entitled to have the same so tried.

The provisions as to notice of trial by the plaintiff are taken from Rule 1 of the XXXIInd Order of the Rules of Court drawn up in 1874 under the Principal Act, "Rule 2" being substituted for "Rule 30 of the Schedule to the Act" [of 1873,] in order to adapt the Rule to the present Act. The remainder of the Rule is new.

The Judicature Commissioners recommended that the plaintiff should be at liberty to give notice of trial by any one of the modes of trial specified in Rule 2, which he may prefer, subject to the right of the defendant to move the Judge to appoint any other mode.* This recommendation is carried out in the present Rule, and its principle is applied, *e converso*, in the next.

The only case in which, under the old practice, the plaintiff could give notice of trial *before issue joined* was where the plaintiff's pleading was in denial of the pleading of the defendant, without joining issue, in which case the plaintiff might give notice of trial at the time of delivering *his*

* First Report, p. 13. † *Ib.*

replication or other subsequent pleading by Reg. Gen. Hil. T. 1853, and Rule 40. The practice, in general, was to give notice on the back of the issue.*

The plaintiff may give notice of trial before a Judge, either sitting alone or with assessors, or before a Referee. The defendant may then, within a limited period, assert the time-honoured right of an Englishman to a trial by his peers,† of which the plaintiff is seeking, by virtue of this Act, to deprive him. The present Rule, however, must be read with section 57 of the Principal Act, which empowers the Judge, *without the consent of either party*, to order “any issue of fact” to be tried before a Referee, provided the cause requires any prolonged examination of documents or accounts, or any scientific or local investigation which cannot conveniently be made before a Jury. A similar power was given to a Judge by section 3 of the Common Law Procedure Act, 1854, to force a cause into arbitration.‡ It would seem that the power of referring causes to arbitrators other than official and special Referees—*e.g.*, to barristers on circuit—is still preserved to the Judge by section 76 of the Principal Act.

The present Rule must also be read with Rule 26 of this Order, *infra*, which empowers the Court or a Judge to direct a trial without a Jury of (amongst others) cases falling within the exclusive jurisdiction of the Court of Chancery or Admiralty.

Rule 4.

Subject to the provisions of the following rules, if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as a Court or Judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, and thereby specify one of the modes mentioned in Rule 2; and in such case the plaintiff, on giving notice within the time fixed by Rule 3 that he desires to have the issues of fact tried before a Judge and Jury, [may] be entitled to have the same so tried.

This is Rule 2 of the XXXIInd Order of the Rules of Court drawn up in 1874 under the Principal Act, with the addition, at the commencement of the Rule, of the words “subject to the provisions of the following Rules,” and, at the end, of the important words:—“and in such case the plaintiff on giving notice within the time fixed by Rule 3 that he desires to have the issues of fact tried before a Judge and Jury, [may] be entitled

* Archbold's Practice, p 314.

† See ss. 20 and 22 of the present Act, *supra*.

‡ The decision in *Robson v. Lees*, 6 B & N, 258, that this section applies only to applications *before* trial, is often practically overruled by the Judge at Nisi Prius intimating that he will hear a summons under the section *quasi in camera*.

to have the same so tried" (see the note to Rule 3, *supra*). "Rule 2" is also substituted for "Rule 30 of the Schedule to the Act" [of 1873], in order to adapt the Rule to the present Act.

"Subject to the provisions of the *following* Rules." The expression, as we have seen, was not in the present Rule as originally drawn. It is rather difficult to assign any definite meaning to this constantly-recurring phrase, especially in this and the preceding Rules, in view of the statement that Rule 6 is "subject to the provisions of the *preceding* Rules." See a similar see-saw, Order XVII, Rule 7.

This Rule takes the converse case of a defendant giving notice of trial, in which case the plaintiff has the right of *insisting on trial by Jury*, if the defendant in his notice of trial specifies trial by a Judge or a Referee; but this right is subject to the same exercise by the Judge of his powers under section 57 of the Principal Act, and Rule 26 of the present order, as in the case of a defendant insisting, under Rule 3, on trial by Jury.

"The defendant may give notice of trial." This proceeding somewhat resembles that of *trial by proviso*, under the old practice. In all cases in which after issue joined the plaintiff makes default in proceeding to trial, when, by the practice of the Court, he ought to have so proceeded, the defendant may have the action tried by proviso; that is to say, he may give the plaintiff notice of trial, make up the *Nisi Prius* Record, carry it down, and enter it and proceed to trial, as if he were proceeding as plaintiff, and thus keep the cause from hanging over his head for an indefinite time; but this mode of trial is now very seldom adopted, as the method of giving the plaintiff twenty days' notice to bring the cause on for trial and signing judgment for his costs in case the plaintiff neglects to give notice of trial for the next sittings or assizes,* is generally preferred.

Rule 5.

In any case in which neither the plaintiff nor defendant has given notice under the preceding Rules that he desires to have the issues of fact tried before a Judge and Jury, or in any case within the 57th section of the Act, if the plaintiff or defendant desires to have the action tried in any other mode than that specified in the notice of trial, he shall apply to the Court or a Judge for an order to that effect, within four days from the time of the service of the notice of trial, or within such extended time as a Court or Judge may allow.

This is Rule 3 of the XXXIIInd Order of the Rules of Court drawn up in 1874 under the Principal Act, the words "in any case in which neither the plaintiff nor defendant has given notice under the preceding Rules that he desires to have the issues of fact tried before a Judge and Jury, or

* Common Law Procedure Act, 1852, section 101. Trial by proviso is expressly preserved by section 166 of the same Act.

in any case within the 57th section of this Act," being prefixed at the commencement.

"The preceding Rules," *i.e.*, Rules 3 and 4.

"The 57th section of this Act" is the section of the Principal Act, which gives power to the Court or a Judge to direct trials to take place before Referees.

The "giving notice" referred to here evidently points to the notice which the defendant may give under Rule 3, and the plaintiff, under Rule 4, that he insists upon trial by Jury; the words which follow assume that a particular mode of trial had been specified *previously* in the notice of trial, and that the party desires to have the action tried in some *other* mode. It seems difficult, however, to understand how it can be ascertained that the party has not given notice under Rules 3 or 4 before proceeding under Rule 5, as the time limited in the three Rules for taking action is precisely the same, *i.e.*, four days from the time of the service of the notice of trial.

In cases falling under the 57th section of the Principal Act this Rule confers a substantial benefit on the parties. It enables either of them to apply that the action shall be tried by the Judge alone, or with assessors, or by Judge and Jury, instead of being tried, *as it otherwise would be*, by a Referee.

Rule 6.

Subject to the provisions of the preceding Rules, the Court or a Judge may, in any action at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials, and in all cases may order that one or more issues of fact be tried before any other or others.

This Rule is a re-enactment of Rule 32 of the Principal Act, with the addition at the commencement of the words, "subject to the provisions of the preceding Rules," and at the end of the words, "and in all cases may order that one or more issues of fact be tried before any other or others."

"Subject to the provisions of the preceding Rules." These words are very important, for they restrict the powers of the Judge to fix the mode of trial to cases falling within section 57 of the Principal Act, or Rule 26 of the present Order.

"At any time or from time to time" would seem to include the case of a Judge at Nisi Prius making the order, but see *Robson v. Lees*, 6 H. and N. 258.

"One or more issues of fact." The term "*the issue*" at a trial at Common Law is a compound one, and comprehends all the pleadings. There can, of course, be only *one* such issue. The "issues of fact" referred to in this Rule mean the issues of fact joined in the pleadings, of which issues there may be, of course, *many*.

Rule 7.

Every trial of any question or issue of fact by a Jury shall be held before a single Judge, unless such trial be specially ordered to be held before two or more Judges.

This Rule is a re-enactment of Rule 33 of the Principal Act.

See the saving of the prior powers of a single Judge in section 39 of the Principal Act.

"Specially ordered," as in the case of *a trial at bar*. (The Rule can hardly be meant, however, to exclude the right of the Attorney General to demand a trial at bar in cases in which the Crown is interested.)

Rule 8.

Notice of trial shall state whether it is for the trial of the action or of issues therein; and in actions in the Queen's Bench, Common Pleas, and Exchequer Divisions, the place and day for which it is entered for trial. It may be in the Form No. 14 in Appendix (B), with such variations as circumstances may require.

This is Rule 4 of the XXXIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act, "Appendix B" being substituted for "Schedule (B)" in order to adapt the Rule to the present Act.

No particular form of notice of trial has hitherto been necessary. (*Ginger v. Pyecroft*, 11 L. J. (Q.B.) 182).

On comparing the new form in Appendix (A), No. 14, with the old ones in Chitty's Forms, (Book III, chap. IX), the first thing that is likely to strike the reader is the addition of the words "*by a Judge and Jury*," which, of course, under the old practice would have been mere surplusage; but which are necessary now under Rules 3 and 4 of this Order. The next thing that is likely to strike the reader is that "*in Middlesex*" is substituted for the long description of "*for the sittings within [or for the sittings after] this present term, to be holden at Westminster Hall, in the county of Middlesex.*" By s. 26 of the Principal Act the division of the legal year into terms is abolished, so far as relates to the administration of justice; and the Judges have power to sit and act at any time and in any place, and by Rule 11 of this Order "*notice of trial for Middlesex shall not be for any particular sittings.*" Hence the shortening referred to of the form of notice as to time and place. The words "*for the day of — next,*" are, however, added. This is pursuant to the provision of the present Rule, that in actions in the three Common Law Divisions, "*the place and day,*" for which the cause is entered, are to be stated in the notice of trial. In an action in any of the other Divisions it may be assumed that it will be unnecessary to specify the "*place and day.*" By Rule 12 "*notice of trial elsewhere than in London or Middlesex shall be deemed to be for the first day of the then next Assizes at the place for which notice of trial is given.*" The form formerly in use as to notice of

trial at Assizes will still, it is apprehended, *mutatis mutandis*, be applicable.* It will be necessary, however, to specify *the mode* of trial in addition to the particulars now given.

The present Rule provides that "the notice of trial shall state whether it is for the trial of the action or of issues therein." This was necessary under the old practice, where the defendant had suffered judgment by default for want of a plea as to part or where there were issues both of law and fact,† and it is apprehended that where the Jury who try the issues joined, are also to assess the damages upon a judgment by default, it will still be necessary to specify that they will do so, and the Form No. 14 in Appendix (A) hereto may, by the express terms of the present Rule, be varied, *as circumstances may require*.

Rule 9.

Ten days' notice of trial shall be given, unless the party to whom it is given has consented to take short notice of trial; and shall be sufficient in all cases, unless otherwise ordered by the Court or a Judge. Short notice of trial shall be four days' notice.

This is Rule 5 of the XXXIInd Order of the Rules of Court drawn up in 1874 under the Principal Act. The first clause of this Rule is copied from section 97 of the Common Law Procedure Act, 1852. By Rule 35 of the Reg. Gen. Hil. T., 1853, the expression, "short notice of trial shall in all cases be taken to mean four days."‡

"Short notice of trial." The defendant is not bound to accept "short notice of trial" unless a Judge has ordered him to accept it. If the order binds him to take short notice for a particular sittings, it does not bind him to take short notice for any other sittings.§

Rule 10.

Notice of trial shall be given before entering the action for trial.

This is Rule 6 of the XXXIInd Order of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule alters the previous law. It was no objection to a notice of trial under the former practice, that it was given after the cause had been entered for trial.||

* See Chitty's Forms, p. 136.

† *Ib.*

‡ See *Flowers v. Welch*, 9 Ex., 272.

§ *Slatter v. Painter*, 1 Dowl. N. S., 35; *Abbot v. Abbot*, 7 Taunt, 452; *White v. Clarke*, 8 Dowl., 730.

|| *Ginger v. Pyecroft*, 17 L. J. (Q.B.), 182.

Rule 11.

Notice of trial for London or Middlesex shall not be or operate as for any particular sittings, but shall be deemed to be for any day after the expiration of the notice on which the action may come on for trial in its order upon the list.

This is Rule 7 of the XXXIInd Order of the Rules of Court drawn up in 1874 under the Principal Act.

By section 30 of the Principal Act sittings in London and Middlesex shall, so far as is reasonably practicable, be *held continuously* throughout the year. There will therefore, if this enactment be carried out, be no "*particular sittings*" in London and Middlesex at all.

Rule 12.

Notice of trial elsewhere than in London or Middlesex shall be deemed to be for the first day of the then next Assizes at the place for which notice of trial is given.

This is Rule 8 of the XXXIInd Order of the Rules of Court drawn up in 1874, under the Principal Act.

The form given in Chitty's "*Forms*"* of notice of trial at the Assizes is "*for the next Assizes.*" In country causes, however, under section 101 of the Common Law Procedure Act, 1852, the plaintiff was not to be deemed to be "*in default*" if issue was joined in or in the vacation before one of the issuable terms,† unless he tried at the *second* Assizes after that term. If issue was joined in or in the vacation before one of the other terms, he was in default unless he tried at the next Assizes after that term.‡

Rule 13.

No notice of trial shall be countermanded, except by consent, or by leave of the Court or a Judge, which leave may be given subject to such terms as to costs or otherwise, as may be just.

This is Rule 9 of the XXXIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The Rule alters the previously existing practice on this subject. A *plaintiff*, previously, had the right of countermanding his notice of trial, even in the case of a trial at bar.§ This was hardly fair to defendants.

* Page 136.

† Hilary and Trinity.

‡ See 1 Lush's Practice, p. 493.

§ Archbold's Practice, p. 317.

As to the former practice, see section 98 of the Common Law Procedure Act, 1852, and Reg. Gen. Hil. T., 1853, Rules 34 and 37.

Rule 14.

If the party giving notice of trial for London or Middlesex omits to enter the cause for trial on the day or day after giving notice of trial, the party to whom notice has been given may, unless the notice has been countermanded under the last Rule, within four days enter the action for trial.

This is Rule 10 of the XXXIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

"The party giving notice." The defendant, as we have seen, can give the notice under the circumstances mentioned in Rule 4.

The Rule as to entry of causes in London and Middlesex was, that whether the sitting were within term or after term, the causes must have been entered before 5 p.m. on *the day next but one preceding the sitting*.* (The Rule prior to this made a distinction between entering causes within term and entering them after term.)† The Rule as to entering causes on the day next but one preceding the sitting is not, of course, affected by the present Rule, which provides a very swift remedy for the laches of a party giving notice of trial, and not immediately entering the cause of trial in London and Middlesex.

As to trial by proviso, which was the only case formerly in which the defendant could enter the cause for trial, see note to Rule 4.

The party entering the cause for trial in London and Middlesex takes the record with the panel of jurors annexed to the Associate's Office, and enters the cause for trial with the Associate.

Rule 15.

If notice of trial is given for elsewhere than in London or Middlesex, either party may enter the action for trial. If both parties enter the action for trial, it shall be tried in the order of the plaintiff's entry.

This is Rule 11 of the XXXIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The defendant, as we have seen (see notes to Rules 4 and 14) could only enter the action for trial in the case of trial by proviso, in which case he also gave the notice, of trial.

The present Rule is in accordance with the previously existing practice as to trial by proviso. By s. 116 of the Common Law Procedure Act,

* Reg.-Gen. Trin. Vac., 1868.

† Reg.-Gen. Hil. T., 1853, Rule 43.

1852:—"If records are entered for trial both by the plaintiff and the defendant, the defendant's record shall be treated as standing next in order after the plaintiff's record in the list of causes, and the trial of the cause shall take place accordingly." If the plaintiff's notice of trial be insufficient, his entry will be a nullity, and the defendant may go to trial on his entry, and if the plaintiff does not appear he will be nonsuited (*Brown v. Ottley*, 1 B. and A. 253.)

Rule 16.

The list or lists of actions for trial at the sittings in London and Middlesex respectively shall be prepared, and the actions shall be allotted for trial without reference to the Division of the High Court to which such actions may be attached.

This Rule is a re-enactment of Rule 29 of the Principal Act, with the omission of the words, "in such manner as may be prescribed by Rule of Court," after "allotted for trial."

The Rule will effect a great improvement. Hitherto the Common Pleas at Guildhall has had about 20 special jury cases for 100 set down for trial in the Queen's Bench* at Guildhall.

Rule 17.

The party entering the action for trial shall deliver to the officer a copy of the whole pleadings in the action, for the use of the Judge at the trial. Such copy shall be in print, except as to such parts, if any, of the pleadings as are by these Rules permitted to be written.

This is Rule 12 of the XXXIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

Every pleading which contains more than 3 folios of 72 words each (not being a petition or summons) *must*, by Order XIX. Rule 5, be printed. As to printing, see also the "Additional Rules."

In trials at bar four copies of the issue have to be made out by the Master for the use of the Judges.†

Four clear days before the day appointed for argument of questions of law, the plaintiff delivers, at the Judges' Chambers in Serjeants' Inn, copies of the demurrer-book, special case, special verdict or appeal cases, with the points intended to be insisted on, to the Chief, and also to the Senior Puisne Judge of the Court in which the action is brought, and the defendant delivers copies to the other Judges of the Court next in seniority.‡

* See note to s. 30 of the Principal Act, at p. 75.

† Archbold's Practice, Part I., Chap. XI., p. 374.

‡ Reg. Gen., Hil. T., 1853, Rule 16.

This Rule will be of great utility in enabling the Judge in a trial at Nisi Prius to make himself thoroughly acquainted with the pleadings before the case is called. (See the note to Order XXXIV., Rule 2.)

Rule 18.

If, when an action is called on for trial, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him.

This is Rule 13 of the XXXIInd Order of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule is merely a rehearsal of the existing practice. "If," says Mr. Archbold, "the defendant's attorney and witness be not in attendance when the cause is called on, the plaintiff may proceed in their absence."*

Rule 19.

If, when an action is called on for trial, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action; but if he has a counter-claim, then he may prove such claim so far as the burden of proof lies upon him.

This is Rule 14 of the XXXIInd Order of the Rules of Court drawn up in 1874 under the Principal Act.

The first part of this Rule is in accordance with the existing practice. "If the plaintiff's attorney and witnesses," says Mr. Archbold, "be not in attendance when the cause is called on, the plaintiff will be *non-suited*." †

"Judgment dismissing the action." It is curious how carefully in this Schedule all terms of art are avoided. Judgment dismissing the action is the same, it is apprehended, as a nonsuit. ‡

The second part of the Rule is based upon the analogy of the practice in the case where the defendant does not appear; the plaintiff being, to all intents and purposes, the defendant to the counter-claim.

Rule 20.

Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within six days after the trial; such

* Archbold's Practice, p. 381.

† *Ib.*

‡ Nonsuit, is however, mentioned, *eo nomine*, in Order XLI., Rule 6.

application may be made either at the Assizes or in Middlesex.

This is Rule 15 of the XXXIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The method of remedying any injustice occasioned by the non-appearance of one of the parties when the cause was called on, has generally been hitherto by *new trial*. When a cause was called on as undefended, which stood thirty off in the list, and no notice had been given that it would be taken as an undefended cause, the Court granted a new trial.* In a similar case, where the notice was not given till late on the previous night, the Court granted a new trial.†

The remedy provided by the present Rule is a speedier and less costly one. An "affidavit of merits" will be necessary.

Rule 21.

The Judge may, if he think it expedient for the interests of justice, postpone or adjourn the trial for such time, and upon such terms, if any, as he shall think fit.

This is Rule 16 of the XXXIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The Rule is taken from section 19 of the Common Law Procedure Act, 1854.

Rule 22.

Upon the trial of an action the Judge may, at or after such trial, direct that judgment be entered for any or either party, as he is by law entitled to upon the findings, and either with or without leave to any party to move to set aside or vary the same, or to enter any other judgment, upon such terms, if any, as he shall think fit to impose; or he may direct judgment not to be entered then, and leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or Judge.

This is Rule 17 of the XXXIInd Order of the Rules of Court drawn up in 1874 under the Principal Act.

The Judicature Commissioners recommended that the Judge at the trial

* *Aust v. Fenwick*, 2 Dowl., 246; *Dorriers v. Howell*, 8 Dowl. 277; 6 Bing., N. C., 245.

† *De Medina v. Sharpnell*, 12 L. J. N. S., C. P., 37.

should, *without consent of the parties*, have power to reserve leave to the Court to enter a non-suit or verdict.

The present Rule must be read in connection with Order XL, as to motion for judgment.

These enactments, taken together, greatly enhance the power of the Judges over signing and entering judgment.

The Court or a Judge had, however, under s. 110 of the Common Law Procedure Act, 1852, and Reg. Gen. Hil. T. 1853, Rule 57, power to stay the signing of judgment, under the old practice.*

Rule 23.

Upon every trial at the Assizes, or at the London and Middlesex sitting of the Queen's Bench, Common Pleas, or Exchequer Division, where the officer present at the trial is not the officer by whom judgments ought to be entered, the Associate shall enter all such findings of fact as the Judge may direct to be entered, and the directions, if any, of the Judge as to judgment, and the certificates, if any, granted by the Judge, in a book to be kept for the purpose.

This is Rule 18 of the XXXIIInd Order of the Rules of Court drawn up in 1874 under the Principal Act.

"The officer by whom judgments ought to be entered." By Order XLI, Rule 1, it is provided that "every judgment shall be entered by the proper officer, in a book to be kept for the purpose."

The word "Associate" is defined by Wharton in his Law Lexicon to mean an officer whose duties are to superintend the entry of causes; to attend the sittings at Nisi Prius, and there receive and enter verdicts; to draw up the postea and any Orders of Nisi Prius.

The Statutes relating to Clerks of Assize and to Associates are 33 Hen. 8, c. 24; 15 and 16 Vict. c. 73; 18 and 19 Vict. c. 126; and 32 and 33 Vict. c. 89.

The Stat. of Hen. 8 speaks of "persons that now are Clerks of Assize and shall be associate to any Justice of Assize in any county within the realm of England."

There are Associates and Associates. Three in London—one for each of the Common Law Courts; and eight in the provinces, one for each circuit.†

"The Clerks of Assize are defined by Wharton in the Law Lexicon to be officers who officiate as Associates in the Circuits. They record all judicial proceedings done by the Judges on circuit. There are, however, Associates on each Circuit distinct from the Clerks of Assize.

*Archbold's Practice, p. 524; *Yates v. The Dublin Steam Packet Company* 6 M. and W. 71; 8 Dowl., 482.

† Most of the latter, however, live in London.

Rule 24.

If the Judge shall direct that any judgment be entered for any party absolutely, the certificate of the Associate to that effect shall be a sufficient authority to the proper officer to enter judgment accordingly. The certificate may be in the Form No. 15 in Appendix (B.) hereto.

This is Rule 19 of the XXXIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act, the words "the certificate may be in the Form No. 15 in Appendix (B.) hereto being added." This form is new.

As to entering judgment, see Order XLI. See also Rule 22, *supra*, as to the power of the Judge to direct that judgment shall be entered.

The form of certificate is new. See further as to this certificate the note to Order XLII., Rule 5. See Notanda.

Rule 25.

If the Judge shall direct that any judgment be entered for any party subject to leave to move, judgment shall be entered accordingly upon the production of the Associate's certificate.

This is Rule 20 of the XXXIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

As to entering judgment, see Order XLI.

See also Rule 22 of this Order, *supra*, as to the power of the Judge to direct that judgment shall be entered.

Rule 26.

The Court or a Judge may, if it shall appear desirable, direct a trial without a Jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties, be tried without a Jury.

This is Rule 21 of the XXXIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

See the notes to Rules 3 and 4.

The words "without any consent of parties" point to cases other than those which fall within section 1 of the Common Law Procedure Act, 1954, under which "the parties to any cause may, *by consent in writing*, signed by them or their attorneys leave the decision of any issue of fact to be

tried by the Court * provided that the Court, upon a Rule to show cause or a Judge on summons, shall, in their or his discretion, think fit to allow such trial."

The present Rule extends the range of cases which may be directed to be tried without a Jury to all *Chancery* and *Admiralty* actions and also those, which, in the Court of *Probate*, would be ordered to be tried without a Jury, such as actions where the only issue raised is as to the due execution of the will.

Rule 27.

The Court or a Judge may, if it shall appear, either before or at the trial, that any issue of fact can be more conveniently tried before a Jury, direct that such issue shall be tried by a Judge with a Jury.

This is Rule 23 of XXXIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

See Rules 3 and 4 of this Order, *supra*, as to the power of the parties to insist on trial by Jury. The power given to the Court or a Judge by Rule 6 to order different questions of fact to be tried in different manners is "subject to the provisions" of Rule 3 and 4. The present Rule is not so subject; on the contrary, those Rules are "subject to the provisions" of this Rule, which would clearly give the Court or a Judge power to *overrule* the wish of a plaintiff or defendant that the cause should be tried by the Judge alone, or by the Judge sitting with assessors, or by a Referee, where the defendant or plaintiff has not availed himself of his power under Rules 3 and 4, respectively, to insist on trial by Jury.

Rule 28.

Trials with assessors shall take place in such manner and upon such terms as the Court or a Judge shall direct.

This is Rule 23 of the XXXIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

By Rule 2 actions may be tried before a *Judge* sitting with assessors, or before an official or special *Referee* sitting with assessors. Of course this mode of trial is not applicable to trial by jury. By s. 54 of the Principal Act, the assessors are to be "specially qualified," and the cause may be tried wholly or partly† with their assistance.

The system of trial with assessors has hitherto been localised in the Admiralty Court. The trial of questions of damages and accounts before the Registrar of that Court and his nautical assessors will probably be the model for trials before Referees and their assessors.‡ In special cases the

* See Coote and Tristram's Probate Practice, pp. 272, 273; First Report of Judicature Commission, p. 12.

† Rule 6 of this Order would also seem to sanction this.

‡ As to assessors in the County Courts in Admiralty causes, see 31 and 32 Vict., c. 71, ss. 10, 11, 14, 15, 16.

Judge of the Court of Admiralty will sit with assessors. (See Williams and Bruce on Admiralty Practice, Part II., c. VIII.)

Rule 29.

In any cause the Court or a Judge of the Division to which the cause is assigned may, at any time, or from time to time, order the trial and determination of any question or issue of fact, or partly of fact and partly of law, by any commissioner or commissioners appointed in pursuance of the 29th section of the said Act, or at the sittings to be held in Middlesex or London, and such question or issue shall be tried and determined accordingly.

This is Rule 29 of the XXXIIInd Order of the Rules of Court drawn up in 1874, under the Principal Act, "cause" being substituted for "action" in two places. This jurisdiction must evidently be exercised *before* trial. The Commissioners eligible under s. 29 of the Principal Act are the Common Law Judges, the *future* Divorce, Admiralty, Probate, and Chancery Judges, Serjeants-at-Law, and Queen's Counsel.

Rule 30.

Where any cause or matter, or any question in any cause or matter, is referred to a Referee, he may, subject to the Order of the Court or a Judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the Court or a Judge, proceed with the trial *de die in diem*, in a similar manner as in actions tried by a Jury.

This Rule is a re-enactment of Rule 34 of the Principal Act, the words "any cause" being substituted at the commencement for "an action." (See as to Referees, sections 57, 58, 59, and 83 of the Principal Act, and Rules 2 and 5 of this Order, *supra*.) This and the remaining Rules of this Order are framed under the authority of s. 57 of the Principal Act. "All such trials before Referees shall be conducted in such manner as may be prescribed by Rules of Court."

"Subject to the order of the Court or a Judge." By s. 57 of the Principal Act, "subject to Rules of Court, all such trials before Referees

shall be conducted in such manner as the Court or a Judge ordering the same shall direct."

Rule 31.

Subject to any order to be made by the Court or Judge ordering the same, evidence shall be taken at any trial before a Referee, and the attendance of witnesses may be enforced by subpoena, and every such trial shall be conducted in the same manner, as nearly as circumstance will admit, as trials before a Judge of the High Court, but not so as to make the tribunal of the Referee a public court of justice.

This is Rule 25 of the XXXIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

Rule 32.

Subject to any such order as last aforesaid, the Referee shall have the same authority in the conduct of any reference or trial as a Judge of the High Court when presiding at any trial before him.

This is Rule 26 of the XXXIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

Rule 33.

Nothing in these Rules contained shall authorise any Referee to commit any person to prison, or to enforce any order by attachment or otherwise.

This is Rule 27 of the XXXIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act. The Rule expressly denies to Referees the powers inherent in a Court of Record of committal for contempt of Court. As soon as he has given his decision the Referee is *functus officio*, and the duty of enforcing it belongs to the Court or the Judge who made the reference.

Rule 34.

The Referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially, with power to the

Court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the Court may direct; and the Court shall have power to require any explanation or reasons from the Referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other Referee.

This Rule is a re-enactment of Rule 35 of the Principal Act.

ORDER XXXVII.

EVIDENCE GENERALLY.

Rule 1.

In the absence of any agreement between the parties, and subject to these Rules, the witnesses at the trial of any action or any assessment of damages, shall be examined *vivâ voce* and in open court, but the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that where it appears to the Court or Judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

This Rule is a re-enactment of Rule 36 of the Principal Act. The Rule is a curious compromise between the practice of the Courts of Common Law and Equity, respectively. The Common Law practice of *vivâ voce* examination is to prevail, but power is given to the Court to order proof by affidavit in exceptional cases.

This Rule is referred to in the 20th section of the present Act:—"Nothing in this Act or in the first Schedule hereto, or in any Rules of Court to be made under this Act, *save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read*, shall affect the

mode of giving evidence by the oral examination of witnesses in trials by Jury, or the rules of evidence, or the law relating to jurymen or juries."

In the Court of Chancery the evidence in chief was taken either by affidavit or orally before an examiner, generally in the absence of the opposite party who had, however, the power of cross-examination at a later stage, either orally before an examiner, or in open Court.

This Rule, down to the word "provided," is copied, almost *verbatim*, from the recommendations of the Judicature Commission.*

The last part of the Rule (from "provided" to the end) is new. The Judicature Commission recommended that "any witness *who had made an affidavit* should be liable to cross-examination." (See the next Rule, where a similar recommendation has been adopted.)

Rule 2.

Upon any motion, petition, or summons, evidence may be given by affidavit; but the Court or a Judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

This Rule is a re-enactment of Rule 37 of the Principal Act, the words, "motion, petition, or summons," being substituted for "interlocutory application."

This Rule is copied almost *verbatim* from the recommendations of the Judicature Commission, the words "any motion, petition, or summons," being substituted for "interlocutory applications."†

Rule 3.

Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.

This Rule is a re-enactment of Rule 35 of the Principal Act.

A distinction is here very properly drawn between evidence on affidavit, which is to replace *viva voce* examination in open Court, and mere affidavits in support of motions and summonses, and other interlocutory proceedings.

The law here enacted as to the latter is identical with that laid down by Mr. Day, in reference to affidavits in support of interlocutory motions

* First Report, p. 14.

† *Ib.*

at Common Law :—"When facts are not within the deponent's knowledge, he should allege that he has been informed thereof, or that he verily believes them to be true. Thus, where it is from the circumstances clearly impossible to swear positively—as where the cause of action arose from nonpayment of bills in India—it is considered sufficient to state that the bills were not paid to deponent's knowledge and belief."*

The latter clause of this Rule is taken from Order XL. of the Consolidated Orders of the Court of Chancery, Rules 9 & 10.

Rule 4.

The Court or a Judge may, in cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct.

This Rule is a re-enactment of the last clause of Rule 45 of the Principal Act.

A similar power was given by ss. 46 & 47 of the Common Law Procedure Act, 1854, to the Common Law Courts and Judges.

"Any officer of the Court" would include the existing examiners in Chancery, appointed under 16 & 17 Vict., c. 22, whose offices are clearly saved by s. 77 of the Principal Act.

ORDER XXXVIII.

EVIDENCE BY AFFIDAVIT.

Rule 1.

Within fourteen days after a consent for taking evidence by affidavit as between the plaintiff and the defendant has been given, or within such time as the parties may agree upon, or a Judge in chambers may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof.

This is Rule 1 of the XXXIIIrd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

* Common Law Procedure Acts, p. 52, citing *Hobson v. Campbell*, 1 H. Black., 245.

“ Within fourteen days.” This is the time within which the plaintiff or defendant might apply after issue joined, that the evidence be taken *vivâ voce* at the hearing of the cause, instead of before an examiner.* Evidence by affidavit was, however, permissible after issue joined, instead of before an examiner.† The practice in this and the two following Rules is new. See Rule 6. The evidence is to be closed before notice of trial is given.

Rule 2.

The defendant within fourteen days after delivery of such list, or within such time as the parties may agree upon, or a Judge in chambers may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof.

This is Rule 2 of the XXXIIIrd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

Rule 3.

Within seven days after the expiration of the said fourteen days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof.

This is Rule 3 of the XXXIIIrd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

Rule 4.

When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination before the Court at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any

* Order of 5th February, 1861, Rule 3. But see Rule 10 of the same Order.

† Rule 5 of same Order

case the Court or a Judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production.

This is Rule 4 of the XXXIIIrd Order of the Rules of Court, drawn up in 1871, under the Principal Act.

The Rule is copied from the 19th Rule of the Chancery Order of 5th February, 1861. The important little word "not" has, however, been inserted in the last sentence.

Rule 5.

The party to whom such notice as is mentioned in the last preceding Rule is given shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined.

This is Rule 5 of Order XXXIII. of the Rules of Court, drawn up in 1874, under the Principal Act.

The Rule is copied from the 21st Rule of the Chancery Order of the 5th February, 1861.

Rule 6.

When the evidence in any action is under this Order taken by affidavit such evidence shall be printed, and the notice of trial shall be given at the same time or times after the close of the evidence as in other cases is by these Rules provided after the close of the pleadings.

This is Rule 6 of the XXXIIIrd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The direction as to printing is taken from the 1st Rule of the Chancery Order of the 16th May, 1862.

By the 5th Order of the Additional Rules of Court, elaborate provision is made for the printing of affidavits and the supply of copies at a cheap rate. One of the directions is, that the affidavit is to be printed in the manner provided by Rule 2 of Order LVI of this schedule, *infra*.*

* The Rules of Order V of the "Additional Rules," numbered 9 to 14 (inclusive), relative to supplying written copies of affidavits to the opposite party, are taken *verbatim* from Order XXXVI of the Consolidated Orders of the Court of Chancery.

ORDER XXXIX.

MOTION FOR NEW TRIAL.

Rule 1

A party desirous of obtaining a new trial of any cause tried in the Queen's Bench, Common Pleas, or Exchequer Divisions on which a verdict has been found by a Jury, or by a Judge without a Jury, must apply for the same to a Divisional Court by motion for an order calling upon the opposite party to show cause at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within four days after the trial, if the Divisional Court is then sitting, or within the first four days after the commencement of the sitting of the Divisional Court next after the trial, or within such extended time as the Court or a Judge may allow.

This is Rule 1 of the XXXIVth Order of the Rules of Court drawn up in 1874, under the Principal Act, with the addition of the words "of any cause tried in the Queen's Bench, Common Pleas, or Exchequer Divisions on which a verdict has been found by a Jury, or by a Judge without a Jury," thus confining the Order to the Common Law Divisions of the Supreme Court.

"A Divisional Court." Under the old practice, the application was made in the Court in which the action was pending. But under this Act, all actions except those inferior Courts, will be commenced in *one Court*, the High Court of Justice, and the Divisional Courts will be part of that Court.

Dr. Stephen points out* that this provision of applying to "a Divisional Court" is in analogy to the practice which has hitherto required an application for a new trial to be made to the Court in banc."

"Such motion shall be made within four days." By Reg. Gen. Hil. T., 1853, Rule 50, "No motion for a new trial shall be allowed after the expiration of four days from the trial, nor in any case after the expiration of the term, if the cause be tried in term, or after the expiration of first four days of the ensuing term, when the cause is tried out of term, unless entered in a list of postponed motions by leave of the Court."

The distinction between sittings within term and out of term are abolished by s. 26 of the Principal Act, so far as relates to the administration of justice. The curious and remarkable rule that if the action were tried in term, the rule must be moved for in term, has no counterpart in the new practice, but "the first four days of the sitting of the

* 3 Steph Comm., 561, 562, 7th edn.

Divisional Court next after the trial" answer, to some extent, to "the first four days of the ensuing term."*

Leave to *vary* the stereotyped time of application is still preserved by the present rule, but there is no allusion to any "list of postponed motions."

The Judicature Commission recommended† that "the time within which an application must be made for a new trial, should be regulated by General Orders of the Supreme Court."

The Courts have hitherto been very rigid in adhering to the time limited by the Reg. Gen. Hil. T., 1853,‡ but, under very peculiar circumstances, they would allow the motion to be made at any time before judgment was actually signed.§

Rule 2.

A copy of such order shall be served on the opposite party within four days from the time of the same being made.

This is Rule 2 of the XXXIVth Order of the Rules of Court drawn up in 1874, under the Principal Act.

This Rule is in accordance with the former practice, that notice must be served on the attorney of the opposite party when the motion was entered on the list of postponed motions, or was postponed, in the case of a cause tried in term, by leave of the Court.|| But the notice must, in future, be given in all cases, and within four days.

Rule 3.

A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action ; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only.

* As to the "sittings" of the Courts, see Order LXI. *infra*.

† First Report, p. 15.

‡ *Ellaby v. Moore*, 22 L. J. (C. P.) 253.

§ *Rex v. Gough*, 2 Doug. 797 ; *Birt v. Barlow*, 1 Doug. 171.

|| Reg. Gen. Hil. T., 1853, Rule 53. See *Doe d. Whitty v. Carr*, 16 Q. B. 117.

This Rule is a re-enactment of Rule 48 of the Principal Act.

Where, under the former practice, there was a misdirection on a point immediately in issue, and for which a bill of exceptions would lie, a new trial was a *matter of right ex debito justitiæ**

Bills of exceptions are, however, abolished by Order LVIII., Rule 1, and under the new practice there will, it would seem, be no new trials, as a *matter of right*.

The whole tendency of this legislation is to place the suitor as much as possible *in the hands of the judge*, as in Courts of Equity, with a view to finality in legal proceedings.†

The Court has always had larger powers of refusing a new trial, in the case of the admission or rejection of evidence, than in that of misdirection, as the former is not likely so directly to influence the verdict as the latter; but if a Judge admitted improper evidence,‡ or rejected evidence which ought to have been admitted,§ the Court would, in general, grant a new trial.¶ With regard to the concluding portion of this Rule, where under the old practice, a party was entitled *ex debito justitiæ*, to a new trial, upon *one of several* issues, the Court could not confine the new trial to such issue only, but must have granted it upon *all* the issues.¶ But if the granting of the new trial upon one of several issues was a matter in the discretion of the Court, it might be granted upon such one issue only.**

Rule 4.

A new trial may be ordered on any question in an action, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question.

This is Rule 3 of the XXXIVth Order of the Rules of Court drawn up in 1874 under the Principal Act.

Formerly, as we have seen,†† the Court could not, where the party was entitled to a new trial *ex debito justitiæ*, confine the new trial to the particular issue wrongly decided, but must have granted it as to all the issues. This Rule enables the Court in all cases to grant a new trial, although the misdirection, &c., affect all the issues, and to confine the new trial to one of them.

Rule 5.

An order to show cause shall be a stay of proceedings

* Archibold's Practice, p. 1519.

† As poor Lord Kenyon used to say, "*Est modus in rebus*—there must be an end of things."

‡ *Tutton v. Andrews*, Baines 448. § *Smedley v. Hill*, 2 W. Bl. 1105.

¶ See *Robinson v. Williamson*, 9, Price, 136.

¶ *Earl of Macclesfield v. Bradley*, 7 M. & W., 570.

** *Ibid* : *Hutchison v. Piper*, 4 Taunt, 555. †† See note to Rule 3 of this Order.

in the action, unless the Court shall order that it shall not be so as to the whole or any part of the action.

This is Rule 4 of the XXXIVth Order of the Rules of Court drawn up in 1874 under the Principal Act.

This is a salutary enactment. The Order to show cause is to be *ipso facto*, so soon as made, a stay of proceedings. Formerly the opposite party might have signed judgment, and even issued execution, notwithstanding the order to show cause; but by 1 Wm. 4, c. 7, s. 4, the Court might have ordered the judgment to be vacated, or the execution to be stayed, and have granted a new trial, the party being restored *in integrum*, a very circuitous proceeding. The proper course, it was said, where judgment had been signed was "to move promptly to set it aside."* This race, which was hardly becoming, will be no longer necessary.

ORDER XI.

MOTION FOR JUDGMENT.

Rule 1.

Except where by the Act, or by these Rules, it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment.

This is Rule 1 of Order XXXV of the Rules of Court drawn up in 1874 under the Principal Act.

"Except where by the Act or by these Rules it is provided that judgment may be obtained in any other manner." Motion for judgment is not, it would seem, necessary where either final or interlocutory judgment is entered for *want of appearance* under the provisions of Order 13 or for *want of pleading* under the provisions of Order 29; (see those Orders). The right to enter judgment would, in these cases, seem to be complete when the opposite party is *in default*. And after trial, also, the Judge may, by order 3f, Rule 22, direct that judgment be entered for any parties, and in this case, unless the parties choose to avail themselves of the expensive luxury of moving for judgment under the present Order, it is apprehended that they need not do so, but may rest content with the order of the judge. In nine cases out of ten probably this will be the course pursued. In the Court of Chancery there was a form of proceeding called "motion for decree," made, (however, before replication), from which the idea of "motion for judgment" seems to have been derived. (See the chapter on "motions for decree" in Daniel's "Chancery Practice").

The practice is otherwise new, and is substantially confined to judgment *after trial*. (See Order 36, Rule 22.)

Rule 2.

Where at the trial of an action the Judge or a Referee

* *Doe d. Whitby v. Carr*, 20 L. J. (Q. B.) 83.

has ordered that any judgment be entered subject to leave to move, the party to whom leave has been reserved shall set down the action on motion for judgment, and give notice thereof to the other parties within the time limited by the Judge in reserving leave, or, if no time has been limited, within ten days after the trial. The notice of motion shall state the grounds of the motion, and the relief sought, and that the motion is pursuant to leave reserved.

This is Rule 2 of the XXXVth Order of the Rules of Court drawn up in 1874, under the Principal Act.

The power of ordering "at or after any trial" that judgment be entered "subject to leave to move," is given to the presiding Judge by Order XXXVI, Rule 22.

The Judicature Commission* recommended that "the Judge at the trial should, *without the consent of the parties*, have power to reserve leave to the Court to enter a nonsuit or a verdict." This recommendation appears to have been carried out in Order XXXVI, Rule 22, already cited. The Commissioners proceed to say that "when the judge at the trial has reserved any question of law, he should have power to direct the cause to be set down for argument before the Court *without motion for a Rule nisi*."

It will be perceived that in the present Order motion for a Rule *nisi* will, under the express terms of Rule 6, although the words "Rule *nisi*" do not themselves occur, be necessary in any case falling under Rules 4 and 5. These are cases of motions to *set aside* a judgment and enter any other, but the motions for judgment mentioned in Rules 1, 2, 3, 7, and 8 do not appear to involve any motion for a Rule *nisi*. Instead of moving, within *four days of the trial* for a Rule *nisi* and then calling upon the opposite party to show cause within *eight days*, the party is, within *ten days* of the trial, to "set down the action on motion for judgment," and serve the opposite party with notice of the motion, and, at all events in the notice to be served under the present Rule, the ground of the motion and the relief sought are to be stated. The opposite party will therefore, in these cases, show cause, it is submitted, in the first instance. See, also, Order LIII, Rule 2 and the note thereto.

Rule 3.

Where at the trial of an action the Judge or Referee abstains from directing any judgment to be entered, the plaintiff may set down the action on motion for judgment. If he does not so set it down and give notice thereof to the other parties within ten days after the trial, any

* First Report, p. 15.

defendant may set down the action on motion for judgment, and give notice thereof to the other parties.

This is Rule 3 of the XXXVth Order of the Rules of Court drawn up in 1874 under the Principal Act.

See Rule 7 of this Order and note to last Rule.

“Abstains from directing any judgment to be entered.” “The Judge may also after the trial direct judgment not to be entered, and leave the party to move for judgment.” Order XXXVI, Rule 22. “Abstaining from directing” appears to be equivalent to directing that judgment shall not be entered.

Rule 4.

Where at the trial of an action before a Jury the Judge has directed that any judgment be entered, any party may, without any leave reserved, move to set aside such judgment, and enter any other judgment, on the ground that the judgment directed to be entered is wrong, by reason of the Judge having caused the finding to be entered wrongly, with reference to the finding of the jury upon the question or questions submitted to them.

This is Rule 4 of the XXXVth Order of the Rules of Court drawn up in 1874 under the Principal Act.

See Order XXXVI, Rule 22, *supra*.

The motion is to be made in a Divisional Court within 4 days of the trial, as in the case of a motion for a new trial, under Order XXXIX, Rule 1. (Rule 6, *infra*.)

Under the old practice any party might have applied to the Court or Judge to amend the *postea*.*

A Judge's direction as to the settlement of the *postea* according to his notes of trial could not, however, hitherto have been questioned in the Court above.†

Rule 5.

Where at the trial of an action the Judge or a Referee has directed that any judgment be entered, any party may, without any leave reserved, move to set aside such judgment, and to enter any other judgment, on the ground that upon the finding as entered the judgment so directed is wrong.

*Archbold's Practice, 462, *et seq*.

† *Sandford v. Alcock*, 10 M. and W. 689. *Newton v. Harland*, 9 Dowl, 65; *Kilner v. Bailey*, 5 M. and W. 382.

This is Rule 5 of the XXXVth Order of the Rules of Court drawn up in 1874 under the Principal Act.

The motion is, like the last, to be made to a Divisional Court, within 4 days of the trial, as in the case of motion for a new trial, under Order XXXIX, Rule 1. (Rule 6 *infra*.)

The last Rule gave leave to move, without leave reserved, when the *finding* entered did not agree with the *verdict* actually given. The present Rule gives leave to move, without leave reserved, where the *judgment* directed to be entered does not agree with the *finding* entered. The judgment entered might, under the old practice, have been amended on application to the Court, both in its form and in its substance.*

Rule 6.

On every motion made under either of the last two preceding Rules, the order shall be an order to show cause, and shall be returnable in eight days. The motion shall be made within four days after the trial if the Divisional Court is then sitting, or within the first four days after the commencement of the sitting of the Divisional Court next after the trial, or within such extended time as a Court or Judge may allow.

This is Rule 6 of the XXXVth Order of the Rules of Court drawn up in 1874 under the Principal Act.

"Returnable in 8 days." This is the time fixed for *showing cause* on a Rule *nisi* for a new trial. Order XXXIX, Rule 1.

"Within 4 days, &c." The time within which the application is to be made is identical with that fixed by Order XXXIX, Rule 1, for *moving* for a new trial.

Rule 7.

Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, the plaintiff may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down, and give notice thereof to the other parties within ten days after his right so to do has arisen, then, after the expiration of such ten days,

*Archbold's Practice, p. 545,

any defendant may set down the action on motion for judgment, and give notice thereof to the other parties.

This is Rule 7 of the XXXVth Order of the Rules of Court drawn up in 1874 under the Principal Act.

See Rule 3 of this Order, and note to Rule 2.

The present Rule seems to contemplate the trial of particular issues as well as the trial of "the issue," properly so called, in an action: and the trial thereof in any of the "manners" mentioned in Order XXXVI, Rule 2:

Rule 8.

Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a Judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the Court or Judge may, if satisfied with the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact.

This is Rule 8 of the XXXVth Order of the Rules of Court drawn up in 1874 under the Principal Act.

Under the old practice, the verdict must have been given on all the issues: but the Jury might, by consent, have been discharged from finding a verdict as to one or more of the issues.*

By Order XXXVI, Rule 6, the Judge may in future order that "one or more questions of fact be tried before the others." The present Rule assumes the exercise of this power by the Judge. The Rule contemplates also the trial of any of these separate questions in any of the modes mentioned in Order XXXVI, Rule 2.

Rule 9.

No action shall, except by leave of the Court or a Judge, be set down on motion for judgment after the

*Archbold's Practice, p. 448.

expiration of one year from the time when the party seeking to set down the same first became entitled so to do.

This is Rule 9 of the XXXVth Order of the Rules of Court drawn up in 1874, under the Principal Act. Compare with this Rule Reg. Genl., Hil., T., 1853, Rule 176, which requires a calendar month's notice of intention to proceed, "in all causes which there have been *no proceedings for one year* from the last proceeding." A plaintiff must declare within a year (Common Law Procedure Act, 1852, s. 58).

Rule 10.

Upon a motion for judgment, or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly; or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration and direct such issues or questions to be tried or determined and such accounts and inquiries to be taken and made, as it may think fit.

This is Rule 10 of the XXXVth Order of the Rules of Court, drawn up in 1874, under the Principal Act, the words "or any other motion under the provisions of the 48th Section of the Act" being omitted after the words "new trial."

"Upon a motion." The language might mean that the Rule would be made absolute in the first instance; but this can hardly be the meaning, as an opportunity must be afforded the opposite party of showing cause, under Order XXXIX, Rule 1 and Rule 6 of this Order.

Rule 11.

Any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to, without waiting for the determination of any other question between the parties. The foregoing Rules of this Order shall not apply to such applications, but any such

application may be made by motion, so soon as the right of the party applying to the relief claimed has appeared from the pleadings. The Court or a Judge may, on any such application, give such relief, subject to such terms, if any, as such Court or Judge may think fit.

The first clause of this Rule is a re-enactment of Rule 40 of the Principal Act. The second and third clauses of the Rule are copied from the 11th Rule of the XXXVth Order of the Rules of Court drawn up in 1874 under the Principal Act, "the foregoing Rules of this Order shall not apply to such applications" being substituted for "none of the Rules of this Order shall apply to applications under section 40 of the Schedule to the Act," so as to adapt the Rule to the present Act.

This Rule is copied from the recommendations of the Judicature Commission:—"We think that either party should be at liberty to apply at any time for such order as he may, upon the admitted facts of the case, be entitled to, without waiting for the determination of any other questions between the parties."

See also Order XXIX, Rule 13.

The *modus operandi* presented by this Rule is identical, *mutatis mutandis*, with the procedure in Chancery known as "Motion for Decree," the present procedure being, however, more elastic, as the motion may be made "at any stage of an action," while the "Motion for Decree" must have been made before replication.

ORDER XLI.

ENTRY OF JUDGMENT.

Rule 1.

Every judgment shall be entered by the proper officer in the book to be kept for the purpose. The party entering the judgment shall deliver to the officer a copy of the whole of the pleadings in the action other than any petition or summons; such copy shall be in print, except such parts (if any) of the pleadings as are by these Rules permitted to be written: Provided that no copy need be delivered of any pleading a copy of which has been delivered on entering any previous judgment in such action. The forms in Appendix (D) hereto may be used, with such variations as circumstances may require.

This is Rule 1 of the 36th Order of the Rules of Court drawn up in 1874 under the Principal Act, with the addition of the words "other than any petition or summons," and the proviso and last clause.

The forms in Appendix (D) are new.

The "proper officer" in actions at Common Law has hitherto been *the Master* who entered the judgment in his book, at the time of signing it.* The "proper officer" in the Court of Chancery has hitherto been one of the entering clerks† of the Registrar's office, who entered the decree pronounced in the cause in the Registrar's book, within one day after it has been left for entry. The entry is examined by the entering clerk, and marked with his initials.‡ Indexes of the entries of decrees are made by the entering clerks, and with the Registrar's books, are, when completed, transmitted to the Report Office in Chancery Lane, where both are preserved under the direction of the Clerks of Records and Writs. On payment of a small fee the public can inspect them during office hours, *i.e.*, from 9 to 3 in the forenoon and 4 to 6 in the afternoon.§ See the Appendix.

Reference is made in Order XXXVI, Rule 23, to "the officer by whom judgments ought to be entered," and his absence from the trial at *Nisi Prius* is alluded to as a likely occurrence. If the masters or the entering clerks continue to be "the proper officers" for entering judgments (a word which, according to the interpretation clause, s. 100 of the Principal Act, includes "decrees") it is evident that their presence on Circuit, or even at the London and Middlesex sittings, will be an unlikely incident. Hence the "book" required to be kept there by that Rule for the purpose of entering "findings" and "certificates" will generally be in the custody of the Associate.

A very nice question arises as to what is the effect of this Order and of Order XXXVI, Rules 22, 23, and 24, upon the previously existing practice in trials at Common Law. Are the *Nisi Prius* Record and the *postea* to be things of the past merely? Not the faintest allusion is made to them in this Schedule, they are simply ignored. Dr. Stephens, writing in 1874, points out that the *postea* is not referred to in the Rules of Procedure annexed to the Judicature Act of 1873; but, he adds, "an analogous practice to that now in use will probably be prescribed."||

An examination of the forms in Appendix (B), No 15, and Appendix (D), would lead to an opposite conclusion now.

Rule 2.

Where any judgment is pronounced by the Court or a Judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, and the judgment shall take effect from that date.

This is Rule 2 of the XXXVIth Order of the Rules of Court drawn up in 1874 under the Principal Act.

The Rule embodies the practice of the Court of Chancery.

Decrees in that Court were dated of the day on which judgment was

* See a copy of it in the Notanda.

† There are two, A to K, and K to Z.

‡ Order 1, Rule 18 of the Consolidated Orders of the Court of Chancery.

§ In vacations from 11 to 1, except on Mondays and Saturdays when the offices are closed.

|| 3 Steph. Comm. p. 558, n (y).

actually pronounced,* and the recital of the day, month and year when it was pronounced preceded the other formal parts of the decree.†

Rule 3.

In all cases not within the last preceding Rule, the entry of judgment shall be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry, and the judgment shall take effect from that date.

This is Rule 3 of the XXXVIth Order of the Rules of Court drawn up in 1874 under the Principal Act.

By Rule 56 of Hil. T. 1853, all judgments, whether interlocutory or final, shall be entered of record of the day of the month or the year, whether in term or vacation, when signed, and shall not have relation to any other day. "Signing" and "entering" judgment are used in the present Act indiscriminately (see, *e.g.*, Order XIII., Rules 3 and 4). They are contemporaneous acts, but not the same act. (See Appendix).

Upon every decree entered in the Registrar's book by one of the entering clerks he marked the day of the month and year when the same was so left for entry.‡ This date had to be reproduced in every writ of execution.

Rule 4.

Where under the Act, or these Rules, or otherwise, it is provided that any judgment may be entered or signed upon the filing of any affidavit or production of any document, the officer shall examine the affidavit or document produced, and if the same be regular, and contain all that is by law required, he shall enter judgment accordingly.

This is Rule 4 of Order XXXVIth of the Rules of Court drawn up in 1874 under the Principal Act.

This is in accordance with the practice of the Court of Chancery. At the time of "bespeaking" a decree, the party bespeaking it must leave with the Registrar in case any party or person served does not appear at the hearing, an affidavit of service on such party or person.§ If admissions are to be entered as read, the original paper of admissions, signed by the parties or their solicitors, must be left for inspection.|| If a traversing

* See *Attorney-General v. Stamford*, 7 Jur., 359, L.C.

† Daniel's Chancery Practice, pp. 844, n (*by*) 862.

‡ Order XXIX., Rule 7, of the Consolidated Orders of the Court of Chancery.

§ Reg. Regul., 15th Mar. 1860, Rule 21.

|| *Ibid*: Rule 23.

note has been filed, and the defendant does not appear at the hearing, the Record and Writ Clerk's certificate that the note has been filed, and an affidavit of service of a copy of the note, and of subpoena to hear judgment must be left for inspection.* If the Bill has been taken *pro confesso*, the order of the Record and Writ Clerk to attend at the hearing, with the record of the Bill, and any previous orders as to contempt, must be left for inspection.†

Rule 5.

Where by the Act, or these Rules, or otherwise, any judgment may be entered pursuant to any order or certificate, or return to any writ, the production of such order or certificate sealed with the seal of the Court, or of such return, shall be a sufficient authority to the officer to enter judgment accordingly.

See the note to the last Rule, and to Rule 1.

This is Rule 5 of the XXXVIth Order of the Rules of Court drawn up in 1874 under the Principal Act, the words "or Schedule," being omitted after the word "Act."

"Any certificate." The reference here is to the certificate of the finding of the Jury, required to be kept in a book by the Associate under Order XXXVI., Rule 23.

This Rule includes a repetition of Order XXXVI., Rule 24.

"Return to any writ." This refers, more particularly, to the return by the Sheriff of the inquisition as to the *quantum* of damages, under a writ of inquiry.

"Sealed with the seal of the Court." This is a practice, analogous to the Crown practice of stamping the *postea* or judgment paper with the seal of the Court.

Rule 6.

Any judgment of nonsuit, unless the Court or a Judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise, or accident, any judgment of nonsuit may be set aside on such terms, as to payment of costs and otherwise, as to the Court or a Judge shall seem just.

This Rule is a re-enactment of the last clause of the 46th Rule of the Principal Act. As to "nonsuit," see Order XXXVI., Rule 19. This Rule will afford a check, it may be assumed, upon plaintiffs electing to be

* Reg. Regul., 15 Mar., 1860, Rule 25.

† *Ib.*, Rule 26.

consulted after they have put the defendant to the trouble of appearing at the trial.

"The reason," says Mr. Serjt. Stephen, "of this practice is that after a nonsuit, which is only a default, the plaintiff has been allowed to commence the same suit again for the same cause of action, but after a verdict had for the defendant and judgment consequent thereupon, he is for ever barred, unless the judgment be afterwards reversed, from attacking the defendant upon the same ground of complaint."*

ORDER XLII.

EXECUTION.

Rule 1.

A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the said Act might have been enforced at the time of the passing thereof.

This is Rule 1 of the XXXVIIIth Order of the Rules of Court, drawn up in 1874 under the Principal Act.

The writs of execution for payment of money in use at Common Law were *fi. fa.*, *lev. fac.*, *ca. sa.*, *elegit*, *venditioni exponas*, *distringas nuper vicecomitem*, *feri facias de bonis ecclesiasticis*, and *sequestrari facias de bonis ecclesiasticis*. These were for the payment of money. There was also the writ of *hab. fac. pos.* for the recovery of land and the writ of delivery for the return of specific chattels detained. Forms of all these writs, except *lev. fac.* and *distringas nuper vicecomitem*, will be found in Appendix (F) to this Schedule. The writs of execution in use in the Court of Chancery were *fi. fa.*, *elegit*, *venditioni exponas*, *feri facias de bonis ecclesiasticis*, *sequestrari facias de bonis ecclesiasticis*, attachment, and sequestration. The first six were borrowed from the Common Law, the last two† were peculiar to the Court of Chancery. Forms of writs of attachment and sequestration will be found in Appendix (F.)

As regards the Court of Probate, by the Probate Act, 1857, s. 25, it was enacted that "the Court of Probate shall have the like powers for enforcing decrees and judgments given by the Court under this Act, as are by law vested in the Court of Chancery."

Attachment for contempt was the only compulsory process (except warrants to arrest ships) ever resorted to in practice in the Admiralty Court to enforce compliance with its decrees.‡

* 3 Steph. Comm., p. 551.

† There was a writ of attachment at Common Law, but it was not a writ of execution for money.

‡ Williams and Bruce's Admiralty Practice, p. 299.

Rule 2.

A judgment for the payment of money into Court may be enforced by writ of sequestration, or in cases in which attachment is authorised by law by attachment.

This is Rule 2 of the XXXVIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

See, as to this Rule, Orders XLIV. and XLVII., *infra*; and also Order XXIX., Rule 3, of the Consolidated Orders of the Court of Chancery.

See also the Debtors' Act, 1869, s. 8.

Rule 3.

A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession.

This is Rule 3 of the XXXVIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This writ was known as the Common Law writ of *hab. fac. pos.*, in ejectment. See further, as to the writ, Order XLVIII.

Rule 4.

A judgment for the recovery of any property other than land or money may be enforced :

By writ for delivery of the property.

By writ of attachment.

By writ of sequestration.

This is Rule 4 of the XXXVIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

As to the writ of delivery, see Order XLIX.

As to the writ of attachment, see Order XLIV. and Rule 2 of this Order.

As to the writ of sequestration, see Order XLVII. and Rule 2 of this Order.

Rule 5.

A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment or by committal.

This is Rule 5 of the XXXVIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

"Attachment" and "committal" are, in one point of view, the same; but it is apprehended that "committal" here means the exercise of the

summary jurisdiction vested in every Judge of a Court of Record of ordering without process or further proof the immediate apprehension and imprisonment of any party whom he considers guilty of contempt in open Court. See Order XLII, Rule 2, of the Consolidated Orders.

(There are other cases, also, in which a Judge has power to commit to prison without process.)

Rule 6.

In these Rules the term "writ of execution" shall include writs of *fieri facias*, *capias*, *elegit*, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party" shall mean the issuing of any such process against his person or property as under the preceding Rules of this Order shall be applicable to the case.

This is Rule 6 of the XXXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

As to writs of *fi. fa.* and *elegit*, see Order XLIII.

As to writs of sequestration, see Order XLVII.

As to writs of attachment, see Order XLIV.

The writ of "*capias*" (*ca. sa.*) is not mentioned as applicable to any "case" under any of "the preceding Rules;" and the only mention of it is in the *present* Rule. There seems to be a popular impression that the writ of *ca. sa.* has been entirely abolished.* There are, however, several cases to which it is still applicable.†

"All subsequent writs," *e.g.*, "*venditioni exponas*;" see Order XLIII., Rule 2.

Rule 7.

Where a judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a Judge for leave to issue execution against such party. And the Court or Judge may, if satisfied that the right to relief has arisen according to the terms of the judgment, order that execution

* By the Debtors' Act, 1869.

† See Sections 4 and 5 of the Act just cited.

issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried.

This is Rule 7 of the XXXVIIIth Order of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule must be read with Rule 23 of this Order, *infra*.

At Common Law it is not usual to specify any conditions or contingencies in the judgment. The forms in the Schedule, Appendix (D), agree with the former practice at Common Law. "It is adjudged that the plaintiff recover against the defendant £ , and £ for his costs of suit." "It is adjudged that the plaintiff recover possession of the land in the said writ mentioned." "It is adjudged that the plaintiff recover nothing against the defendant, and that the defendant recover against the plaintiff £ for his costs of defence." In the case of judgment entered up under a *cognovit*, or on a warrant of attorney, or on a consent order of a Judge, the judgment is equally simple, absolute, and unconditional in its terms; but, before signing it, the conditions precedent (if any) must be fulfilled. Also before issuing execution the conditions precedent (if any) must be performed. Thus, if the *defeazance* to a warrant of attorney to confess judgment, lays it down as a condition precedent to the issuing of execution, that a demand must be made of the money, to which the judgment relates, such demand must be made accordingly,* before execution can issue. But the *judgment* would say nothing about the demand. It would be in the usual, simple, absolute and unconditional form.

The present Rule applies to cases of *decrees in Chancery*,† where by the terms of the decree *itself* some condition is specified or contingency pointed out, which must be fulfilled, or happen, before execution can issue upon the decree.

In all such cases, under the present Rule, three things must have concurred before execution can issue. First, the condition must have been fulfilled, or the contingency have happened; secondly, a demand must have been made upon the party against whom the person is entitled to relief; and thirdly, an application must have been made to the Court, or a Judge, and they or he must have been "satisfied" that the right to relief has arisen according to the terms of the decree.

The Rule would seem to impose two new restrictions not imposed by the previously existing law,‡ were it not that the 23rd Rule says that the Rules of this Order shall *not curtail any right* heretofore existing to enforce any decree. See, however, Order XLIV., Rule 2.

* Archbold's Practice, p. 973.

† By the interpretation clause of the Principal Act (s. 100), "judgment" in these Acts includes "decree."

‡ By Order XXIX., Rule 1, of the Consolidated Orders of the Court of Chancery, *no demand* was necessary where any person was by any decree directed to pay any money, or deliver up and transfer any property, real or personal, to another. By the Order of the 7th of January, 1870, a Commission of sequestration was issued, *without any special order*, at the expiration of the time limited by any decree for the payment of money or costs.

Rule 8.

Where a judgment is against partners in the name of the firm, execution may issue in manner following:—

- (a.) Against any property of the partners as such.
- (b.) Against any person who has admitted on the pleadings that he is, or has been adjudged to be, a partner.
- (c.) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave so to do; and the Court or Judge may give such leave if the liability be not disputed, or, if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

This is Rule 8 of the XXXVIIth Order of the Rules of Court drawn up in 1874 under the Principal Act, the word “a” being inserted before “Judge.”

As to proceedings against parties in the name of the firm see Order XII., Rule 12, and Order XVI., Rule 10.

This Rule only applies to the case of parties sued in the name of the firm. If one of two partners is sued, the old difficulties may still arise from the circumstance that the seizure and disposal of the undivided share of one partner under a *f. fa.* does not divest the other partner of his interest in the partnership property.*

- (c.) As to service on one or more of the partners, see Order IX., Rule 6.

Rule 9.

No writ of execution shall be issued without the production to the officer by whom the same should be issued of the judgment upon which the writ of execution is to issue or an office copy thereof, showing the date of entry.

* See *Burton v. Green*, 3 Carr. and P. 306; Archbold's Practice, pp. 659, 660.

And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution.

This is Rule 9 of the XXXVIIth Order of the Rules of Court drawn up in 1874 under the Principal Act.

“Production of the Judgment.” This is in accordance with the former practice at Common Law, as prescribed by Reg. Gen. Hil. T., 1853, Rule 71. “No writ of execution shall be issued till the judgment paper, *postea*, or inquisition, as the case may be, has been seen by the proper officer.” It is also in accordance with the practice of the Court of Chancery, the decree, or order, or an office copy of it must have been produced to the Record and Writ Clerk, and before issuing the writ he must have been satisfied by affidavit of the due service of the decree, and that it had not been obeyed.*

Rule 10.

No writ of execution shall be issued without the party issuing it, or his solicitor, filing a *præcipe* for that purpose. The *præcipe* shall contain the title of the action, the reference to the record, the date of the judgment, and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firms against whose goods, the execution is to be issued; and shall be signed by the solicitor of the party issuing it, or by the party issuing it, if he do so in person. The forms in Appendix (E) hereto may be used, with such variations as circumstances may require.

The forms in Appendix E. are new.

This Rule is Rule 10 of the XXXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act, the clause referring to the forms in Appendix (E.) being added at the end of the Rule.

“No writ of execution shall be issued without a *præcipe* being filed with the proper officer.” Reg. Gen. Hil. T., 1853, Rule 71. The practice in the Court of Chancery is the same. Previously to the writ being issued, a copy of the *præcipe* must have been left with the entering clerk in the Registrar’s Office, and another copy have been marked by him as entered; and the latter must also have been filed with the Record and Writ Clerk at the time the writ was sealed.+

The forms of the *præcipe* in Appendix (E) are taken from the Chan-

* Braithwaite’s Pr., 167.

+ *Smith v. Thompson*, 4 Mad. 179, Ord. I, Rule 18, of the Consolidated Orders of the Court of Chancery; Braithwaite’s Pr., 161.

cery practice, as will at once be seen in comparing the forms of *præcipe* given in the Form-book, accompanying Daniel's Chancery Practice,* with the forms of *præcipe* contained in Chitty's Practice.†

Rule 11.^f

Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same, and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall also be indorsed upon the writ; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be.

This is Rule 11 of the XXXVIIth Order of the Rules of Court drawn up in 1874, under the Principal Act.

This Rule is copied *verbatim* from the Reg. Gen. Hil. T., 1853, Rule 73, with the omission of the words of that Rule, which suppose the case of an attorney suing out the writ who is not an attorney of the Court from which the writ is issued, these words being unnecessary, as under section 87 of the Principal Act, all attorneys and solicitors of the Superior Courts will be solicitors of the Supreme Court. See note to Order IV., Rule 1, p. 289.

Rule 12.

Every writ of execution shall bear date of the day on which it is issued. The forms in Appendix (F) hereto may be used, with such variations as circumstances may require.

The forms in Appendix (F) are new. See Notes to Orders XLIII-XLIX.

This is Rule 12 of the XXXVIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act, with the addition of the clause referring to the forms in Appendix (F.)

The first clause of the Rule is copied from Reg. Gen. Hil. T., 1853, Rule 72.

* PP. 312, 695, 977, 983, 967.

† PP. 303, 354.

Rule 13.

In every case of execution the party entitled to execution may levy the poundage*, fees, and expenses of execution over and above the sum recovered.

This is Rule 13 of the XXXVIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied *verbatim* from the 123rd section of the Common Law Procedure Act, 1852. See also 29 Eliz. c. 4.

Rule 14.

Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable, and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of £4 per cent. per annum from the time when the judgment was entered up, provided that in cases where there is an agreement between the parties that more than £4 per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed.

This is Rule 14 of the XXXVIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied *verbatim* from Reg. Gen. Hil. T. 1853, Rule 76, with the addition of the words "for the recovery of money," after "every writ of execution."

Rule 15.

Every person to whom any sum of money or any costs shall be payable under a judgment shall, immediately after the time when the judgment was duly entered, be entitled to sue out one or more writ or writs of *fiery facias* or one or more writ or writs of *elegit* to enforce payment thereof, subject, nevertheless, as follows:—

(a.) If the judgment is for payment within a period

* 12d. in every £1; if over £100, 6d. for every £1 above £100.

therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period.

- (b.) The Court or Judge at the time of giving judgment, or the Court or a Judge afterwards, may give leave to issue execution before, or may stay execution until, any time after the expiration of the periods hereinbefore prescribed.

This is Rule 15 of the XXXVIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The previous practice at Common Law was prescribed by s. 120 of the Common Law Procedure Act, 1852, and Rule 57 of the Reg. Gen. Hil. T., 1853,* under which execution issued in *fourteen days* after judgment was signed, unless the Court or Judge ordered execution to issue at an earlier or later period. It was usual for the Judge at the trial to grant execution within 4 days, called "speedy execution" under 1 Wm. IV., c. 7, s. 2, in all *substantially* undefended actions for liquidated claims, and in ejectment to recover vacant possession.† Against acceptors of bills of exchange and makers of promissory notes speedy execution was granted, almost as a matter of course.

The practice in Equity as to issuing a *fi. fa.* or *elegit* for payment of a sum of money, was regulated by Order XXIX, Rule 6, of the Consolidated Orders of the Court of Chancery, which required that a lunar month (*twenty-eight days*)‡ should elapse from the entry of the decree before suing out the writ. A writ of attachment, on the other hand, for the non-performance of a decree, issued as soon as the Record and Writ Clerk was satisfied by affidavit that the decree had been duly served, and had not been obeyed.§

A writ of sequestration issued on the return of the writ of attachment. If, however, a *time was limited* by the decree for payment of any money, or for the performance of any other act, a writ of sequestration in the former case, and a writ of attachment in the latter, issued *at the expiration of the time so limited*.||

The present Rule, it will be seen, effects a very important alteration in the law of execution in favour of the party who has entered judgment for a *sum of money or costs*. He will, on the entry of the judgment, be entitled to IMMEDIATE EXECUTION by *fi. fa.* or *elegit*, unless there be a time limited by the judgment (or decree). The exception established by subsection (a) follows the 7th Rule of this Order, and the previous practice of the Courts of Chancery. (See the note to that Rule.) A writ of *sequestration* may issue, in the Chancery Division, as under the former practice, at the expiration of the time limited, and this practice is extended by Order XLVII, *infra*, to the Common Law Divisions of the High Court.

* These enactments are both very obscurely expressed. The former speaks of 14 days after *verdict*; the latter lumps up judgment and execution together.

† Day's Common Law Procedure Acts, p. 143. Archbold's Practice, p. 413. ‡ Order XXXVII, Rule 10 of the Consolidated Orders.

§ Daniel's Chancery Practice, p. 908; Braithwaite's Pr., 167.

|| Order of the 7th January, 1870.

Subsection (b) saves the power of the Court or Judge to modify the practice by accelerating or retarding execution. This subsection, it would seem, by the word "hereinbefore," gives the Court or Judge power to order the issue of execution *before* the time limited by a judgment (or decree) has expired.

Rule 16.

A writ of execution, if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, by leave of the Court or a Judge, be renewed, by the party issuing it, for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the Court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the Court; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof.

This is Rule 16 of Order XXXVII. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied almost *verbatim* from section 124 of the Common Law Procedure Act, 1852. It omits, however, the direction that the seal shall be "kept at the office of the masters of the Court," and the word "issue" has been substituted for "*teste*."

The notice to the sheriff is necessary where the writ is in the possession of that functionary. If the party does not wish the writ to be executed, however, he will retain it in his own possession after renewal as well as before it.

There is a curious slip in this Rule, the word "attorney" having been left in; it should have been "solicitor" (see s. 87 of the Principal Act at p. 156).

Rule 17.

The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal as in the last preceding Rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed.

This is Rule 17 of Order XXXVII of the Rules of Court, drawn up in 1874, under the Principal Act.

The Rule is copied from section 125 of the Common Law Procedure Act, 1852.

"Sufficient evidence" means *prima facie* evidence (see note to Order VIII, Rule 2, p. 302).

Rule 18.

As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment.

This is Rule 18 of the XXXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

Section 128 of the Common Law Procedure Act, 1852, provided, that "during the lives of the parties to a judgment or those of them during whose lives execution may at present issue within a year and a day without a scire facias, and within six years after the recovery of the judgment execution may issue without a revival of the judgment."

Rule 19.

Where six years have elapsed since the judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly. And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or Judge may impose such terms, as to costs or otherwise, as shall seem just.

This is Rule 19 of the XXXVIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is taken from sections 129 and 130 of the Common Law Procedure Act, 1852, with, however, some important changes. S. 129 of the Common Law Procedure Act is classed in most of the text books not under the head of "renewal of writs of execution," but of "revival of

judgments.”* Revival of judgments is entirely ignored in the present enactment, and the process applicable to it is appropriated, to some extent, to the renewal of writs. The 129th section gave the party desirous of renewing his judgment the alternative of suing out a writ of revivor of the judgment, or of applying to the Court or a Judge for leave to enter a “suggestion” that it manifestly appeared that the party was entitled to issue execution upon the judgment, and upon such application the Court or Judge might (by s. 130) allow such suggestion to be entered accordingly. The framers of the present Rule have adapted the alternative modes of procedure, discarding the “suggestion,” and substituting for it a simple “order that the party is entitled to issue execution,” and discarding the title “writ of revivor,” and substituting for it an “order” that an “issue” be “tried” “in any of the ways in which any question in an action may be tried.” S. 131 of the Common Law Procedure Act, 1852, provided that “the pleadings and proceedings upon a writ of revivor should be the same as in an ordinary action.” The “ways” in which an action under this Act may be “tried” are specified in Order XXXVI., Rule 2. The costs are to be in the discretion of the Court or Judge. The old practice as to costs is contained in ss. 130 and 131 of the Common Law Procedure Act, 1852.

In the case of a writ of revivor the writ of execution must have been founded on the judgment on the writ of revivor.† It is apprehended that the practice will be similar where an issue is under this Rule directed to be tried.

It will be perceived that there is no limit of time fixed in this Rule within which the application must be made. A writ of revivor might have issued at any time within twenty years.‡

Rule 20.

Every order of the Court or a Judge, whether in an action, cause or matter, may be enforced in the same manner as a judgment to the same effect.

This is Rule 20 of the XXXVIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This is in accordance with the practice of the Court of Chancery. The process to enforce decrees and the process to enforce orders was in that Court absolutely identical. The XXIXth of the Consolidated Orders treats of them both together, without any distinction.

Rule 21.

In cases other than those mentioned in Rule 18, any person, not being a party in an action, who obtains any order or in whose favour any order is made, shall be

* See Chitty's "Forms," book 8, chapter 8; Archbold's Practice, vol. 2, part 3, chapter 6. In Lush's Practice judgment and execution are treated of together in book 1, chapter 9 (see p. 577).

† *Davis v. Norton*, 1 Bing. 133.

‡ And after twenty years, if there was an acknowledgment within the twenty years, 3 & 4 Wm. IV., c. 29, s. 40.

entitled to enforce obedience to such order by the same process as if he were a party to the action; and any person not being a party in an action, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action.

This is Rule 21 of the XXXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied *verbatim* from Order XXIX., Rule 2, of the Consolidated Orders of the Court of Chancery. It works a great and salutary change in Common Law Procedure. As a general rule, where a person who was not a party to a judgment derived a benefit by, or became chargeable to the execution, proceedings had to be taken by writ of revivor, *scire facias*, or "suggestion," to make him a party to the judgment* before issuing execution—a cumbrous procedure.

Rule 22.

No proceeding by *auditâ querelâ* shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a Judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court or Judge may give such relief and upon such terms as may be just

This is Rule 22 of Order XXXVII. of the Rules of Court, drawn up in 1874, under the Principal Act.

The *auditâ querelâ* was a writ that lay for the defendant against whom judgment was given, and who was therefore in danger of execution, or perhaps actually in execution, but who was entitled to be relieved upon some matter of discharge which had happened since the judgment, as if the plaintiff had given him a general release, or if he had paid the debt to the plaintiff. It was a writ directed to the Court in which the judgment was recovered, stating that the complaint of the defendant had been heard, *auditâ querelâ defendantis*, and then setting forth the matter of complaint, and enjoining the Court to call the parties before them, and cause justice to be done. But the indulgence shown by the Courts in granting relief upon motion almost superseded the remedy by *auditâ querelâ*, and it might be said to have been nearly obsolete.†

* 2 Saund. 6, n. 1; *Penoyer v. Brace*, 1 Lord Raym., 244; *Ransford v. Bosanquet*, 12 A. and E. 813; 2 Archbold's Practice, p. 1,122.

† See Steph. Black., vol. 3, p. 577 n (n) 7th edn.; 2 Saund. 137e.

A simple application by motion to a Court or by summons to a Judge is substituted by the present Rule for the abolished writ of *audita querela*. An affidavit of the facts will probably be necessary, as it was under the Reg. Gen. Hil. T., 1853, Rule 79.*

Rule 23.

Nothing in any of the Rules of this Order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever.

This is Rule 23 of the XXXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

See, however, the note to Rule 7 of this Order, and Order XLIV., Rule 2.

Rule 24.

Nothing in this Order shall affect the order in which writs of execution may be issued.

This is Rule 24 of the XXXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

Writs of *fi. fa.*, *lev. fac.*, *ca. sa.*† and *elegit* may all be sued out at the same time; but when any one has been effectually executed, nothing can be done on another till the first has been returned. When returned, if it is a *fi. fa.*, and it appears by the return that part only has been executed, or if it is an *elegit* and part only has been levied on the goods, the party entitled to execution may issue a new writ of *fi. fa.*, *lev. fac.*, *ca. sa.*, or *elegit* for the remainder. No writ can be sued out for the remainder, however trifling the part may be which has been levied, until after the previous writ has been returned. If, on the other hand, the body be taken under a *ca. sa.*, no other writ can be executed in respect of the same judgment, unless the party whose body is taken escape, or be rescued, or die in execution. So, if lands be extended on an *elegit* and delivered to the judgment creditor, a *fi. fa.*, or *ca. sa.*, or *lev. fac.* or fresh *elegit* cannot be executed against the judgment debtor in respect of the judgment upon which the *elegit* issued.

All this learning of the "succession of writs" is preserved by the present Rule.

ORDER XLIII.

WRITS OF FIERI FACIAS AND ELEGIT.

Rule 1.

Writs of *fieri facias* and of *elegit* shall have the same force and effect as the like writs have heretofore had,

* *Dearie v. Ker*, 4 Ex., 82.

† Subject as to *ca. sa.*, of course, to the Debtors' Act, 1869, s. 4.

and shall be executed in the same manner in which the like writs have heretofore been executed.

This is Rule 1 of the XXXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

See the note to Order XLII., Rule 24, *supra*, as to the succession in which writs of *fi. fa.* and *elegit* may be issued.

A form of the writ of *fi. fa.* will be found in the Appendix (F) No. 1; and of the writ of *elegit* in Appendix (F) No. 2. The form of the writ of *fi. fa.* is modelled upon the form of the writ contained in the Schedule (F), No. 1, to the Consolidated Orders of the Court of Chancery, not upon the Common Law form contained in the Schedule to the Reg. Gen. Hil. T., 1853. This will be seen to be the case on comparing the forms. The mention of costs, however, *eo nomine*, in the form contained in Appendix (F) to this Act is *new*, and it is important for the legal practitioner to note that it is necessary to specify their amount and also the date of the taxing-master's certificate, and that there is a separate direction to the sheriff to levy the amount of the costs plus £4 interest upon them from the date of the certificate of taxation. The rate of interest on the sum recovered is left open, instead of being fixed at £4 per cent. as heretofore in both Common Law and Chancery forms. (But see Order XLII., Rule 14.)

The Common Law form directs the sheriff to levy the sum recovered plus interest at £4 per cent.

The Chancery form first directs the sheriff to levy the sum recovered, and then separately directs him to levy interest on that sum at £4 per cent.

The new form first directs the sheriff to levy the sum recovered plus interest on that sum at £ per cent., and then separately directs him to levy the costs plus interest on them at £4 per cent.

The same particulars as to costs must be entered in the writ of *elegit* as in the writ of *fi. fa.**

It will be seen that the writ is tested, "witness OURSELVES at Westminster," &c. The form of *teste* to several of the other writs is "Witness *ourselves* at Westminster, the day of 1875, in the year of our reign."

This is much more in keeping with the regal style than the Common Law form of *teste*, "Witness Sir Alexander Cockburn, Knight, at Westminster, the day of in the year of our Lord ." It will be seen on turning to the Schedule (G) to the Consolidated Orders of the Court of Chancery that the form of *teste* in the Appendix (F) to this Schedule is taken from the form of *teste* in use in the Court of Chancery, but, curiously enough, omitting the name of the Judge, which appears at the foot of the *teste* on the Chancery forms. The form given of *teste* to the writ of summons is merely "Witness, &c." in Appendix A to this Schedule. The full form of the *teste* to the writ of subpoena in Chancery, given in Schedule (E) of the Consolidated Order, is "Witness *ourselves* at Westminster the day of in the year of our reign" the name of the M. R. being *subscribed*.†

* The learning relative to writs of *fi. fa.* and *elegit* is very familiar and accessible. The reader who desires further information is referred to Archbold's Practice, part 1, chap. XXVII. (I, II, III).

† See Order II., Rule 8, *supra*. The name of the Chancellor will be subscribed at the foot of the *teste*, not in the middle, like that of the chiefs of the Common Law.

It appears to be that both in the case of writs of summons and writs of execution the *teste* will be as follows: "Witness ourselves at Westminster the day of 187 in the year of our reign.

"CAIRNS, C."

Rule 2.

Writs of *venditioni exponas*, *distringas nuper vicecomitem*, *fieri facias de bonis ecclesiasticis*, *sequestrari facias de bonis ecclesiasticis*, and all other writs in aid of a writ of *fieri facias* or of *elegit*, may be issued and executed in the same cases and in the same manner as heretofore.

This is Rule 1 of the XXXVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

A form of the writ *venditioni exponas* will be found in Appendix (F), No. 3; of the writ *fieri facias de bonis ecclesiasticis* in Appendix (F), Nos. 4 and 5; and of the writ *sequestrari facias de bonis ecclesiasticis* in Appendix (F), No. 6.

Upon the return of the sheriff that the goods remain on his hands under the writ of *fi. fa. for want of buyers*, the party entitled to execution may sue out a writ of *venditioni exponas*, which is a kind of supplemental writ of *fi. fa.*, commanding the sheriff to sell the goods forthwith. Under this writ the sheriff must sell, and is therefore justified in doing so at the best price that he can get, however inadequate it may be. This writ the sheriff may be called on by a side bar rule to return.

Where a sheriff goes out of office after returning that he has levied, but that the goods remain in his hands for want of buyers, instead of suing out a writ of *venditioni exponas*, the party entitled to execution may sue out a writ of *distringas nuper vicecomitem*, directed to the then present sheriff, commanding him to *distrain the late sheriff* to sell the goods. The former sheriff must thereupon sell the goods and pay over the money, otherwise he will forfeit issues to the amount of the debt.

When the sheriff to a writ of *fi. fa.* returns *nulla bona*, and that the party against whom it was issued is a beneficed clerk, not having any lay fee, the party entitled to execution may sue out a *fi. fa. de bonis ecclesiasticis*, directed to the bishop of the diocese (or to the archbishop, during the vacancy of the bishop's see), commanding him to cause to be made of the ecclesiastical goods belonging to the judgment debtor within his diocese, the amount of the judgment debt. The writ must be delivered to the registrar of the diocese, who will thereupon issue a sequestration, directed to the churchwardens, requiring them to levy the debt of the tithes and other profits of the clerk's benefice. The writ has priority only from the date of its publication, which is effected by affixing a copy of the writ on the doors of the churches and chapels within the parish in which the benefice is situated.

Instead of a *fi. fa. de bonis ecclesiasticis*, the party entitled to execution may sue out against a judgment debtor who is a beneficed clerk a writ of *sequestrari facias*, also directed to the bishop of the diocese, commanding him to enter into the rectory and parish church and take and sequester the same into his possession, and hold them until all the rents, tithes, rent-charges, oblations, obventions, fruits, issues, and profits, and of the

other ecclesiastical goods in the diocese belonging to the debtor as rector, he shall have levied the judgment debt. This writ is in the nature of a *levari facias*. The rector cannot be turned out, however, of the parsonage house, as he is bound to reside notwithstanding the sequestration. The sequestrator is empowered by 12 & 13 Vict., c. 67, to bring actions and levy distresses in his own name.

ORDER XLIV.

ATTACHMENT.

Rule 1.

A writ of attachment shall have the same effect as a writ of attachment issued out of the Court of Chancery has heretofore had.

This is Rule 1 of the XXXIXth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

See a form of the writ of attachment in Appendix (F), No. 9. There are different kinds of writs of attachment, *e.g.*, attachment in mesne process to enforce appearance, &c., and attachment on final process, to enforce the execution of decrees and orders. It is to the latter that allusion is here made. The form of the writ in all cases is the same, the indorsement only is different in different cases. The form in the Appendix (F), No. 9, is the stereotyped one.* The instrument (which should strictly follow the language of the decree) recites so much of the mandatory part of the decree as directs payment of the money or performance of the act.

The following form of indorsement may be useful:—

“By the Court.

“For breach of a decree [or an order] dated the day of 1875, made in a cause wherein *C.D.* is plaintiff, and *A.B.* is defendant, in not [here recite so much of the mandatory part of the decree [or order] as directs payment of the money or performance of the act, and explains the purpose for which the attachment is issued], as by the said decree the within-named *A.B.* was commanded.”†

Rule 2.

No writ of attachment shall be issued without the leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued.

This is Rule 2 of the XXXIXth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule throws considerable light upon Order XLII., Rule 7 (see the note to that Rule). It alters completely the former practice in the

* It will be found, *todidem verbis*, in Daniel's Form-book, 313.

† Adapted from Daniel's Form-book, 934.

Court of Chancery. The writ issued there without any leave of Court or Judge, all that was necessary being to satisfy (by affidavit) the Record and Writ Clerk who sealed it that the decree or order had been duly served, and had not been obeyed.

ORDER XLV.

ATTACHMENT OF DEBTS.

Rule 1.

Where a judgment is for the recovery by or payment to any person of money, the party entitled to enforce it may apply to the Court or a Judge for an order that the judgment debtor be orally examined as to whether any and what debts are owing to him, before an officer of the Court, or such other person as the Court or Judge shall appoint; and the Court or Judge may make an order for the examination of such judgment debtor, and for the production of any books or documents.

This is Rule 1 of the XLth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The Rule is copied from section 60 of the Common Law Procedure Act, 1854.

Hitherto, the Court of Chancery has had no proceeding analogous to that of attachment of debts at Common Law,* and a person to whom money has been ordered to be paid by a Court of Equity, has been held not to be a judgment creditor within the meaning of the sections of the Common Law Procedure Act, 1854, relating to attachment of debts.† Henceforth, under this Order, the practice will be the same in Chancery as at Common Law.

It has been held that a debt of unascertained amount,‡ a debt due to one or more of several joint judgment debtors,§ a debt due, but not payable till some future time,|| rent due in the hands of a tenant,¶ and the proceeds of an execution in the hands of the sheriff,** are all attachable.

Rule 2.

The Court or a Judge may, upon the *ex parte* appli-

* See *Horsley v. Cox*, L. R. 4 Ch. 92.

† *Ex parte Financial Corporation*, L. R. 4 C. P. 155.

‡ *Daniel v. McCarthy*, 7 Ir. Com. Law Rep. 261, Q. B.

§ *Miller v. Mynn*, 1 E. & E., 1,075.

|| *Sparks v. Younge*, 8 Ir. Com. Law Rep. 251, Ex.

¶ *Mitchell v. Lee*, L. R. 2, Q. B., 259.

** *Murray v. Simpson*, 8 Com. Law Rep., Appendix XLV., Ex.

cation of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his solicitor stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called "the garnishee") to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a Judge, or an officer of the Court, as such Court or Judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

This is Rule 2 of the XLth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The Rule is copied almost *verbatim* from the 61st section of the Common Law Procedure Act, 1854.*

As a general rule, where a judgment debt remains unsatisfied, if the execution debtor could maintain against the intended garnishee an action to recover the debt, which the execution creditor seeks to attach, an attachment order may be obtained under this Rule, provided the execution creditor could sue out a writ of *fi. fa.* against the execution debtor.†

Rule 3.

Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the Court or Judge shall direct, shall bind such debts in his hands.

This is Rule 3 of Order XL of the Rules of Court, drawn up in 1874, under the Principal Act.

The Rule is copied almost *verbatim* from section 62 of the Common Law Procedure Act, 1854.‡

* See Day's Common Law Procedure Acts, 4th Edn., pp. 314, 315, 316.

† See *Jones v. Jenner*, L. J., 25 Ex., 319, per Bramwell B.; and *Miller v. Mynn*, 1 E. and E., 1875.

‡ See Day's Common Law Procedure Acts, 4th edn., pp. 316, 317.

It seems doubtful whether notice of a prior attachment out of the Lord Mayor's Court interferes with the operation of an order under this Rule ; it certainly would not, when such notice is served out of the limits of the City.*

Rule 4.

If the garnishee does not forthwith pay into court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due, or claimed to be due, from him to the judgment debtor, or if he does not appear upon summons, then the Court or Judge may order execution to issue, and it may issue accordingly, without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment debt.

This is Rule 4 of the XLth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The Rule is copied almost *verbatim* from section 63 of the Common Law Procedure Act, 1854.†

Rule 5.

If the garnishee disputes his liability, the Court or Judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined.

This is Rule 5 of the XLth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The dispute must be a substantial one (*Newman v. Rook*, 4 C. B., N. S. 434) and *bonâ fide* (*Wise v. Brokenshaw*, L. J., 29 Ex., 240).

This Rule is founded, to some extent, on s. 64 of the Common Law Procedure Act, 1854.

That enactment, however, provided that the judgment creditor might, in the event of a dispute, proceed by a writ calling upon the garnishee to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor, if less than the judgment

* See *Newman v. Rook*, 4 C. B., N.S., 434.

† See Day's Common Law Procedure Acts, 4th edn., p. 318.

debt, and for costs of suit. The proceedings upon this writ were the same, *mutatis mutandis*, as upon a writ of revivor.

The present Rule provides* a substitute for this *quasi* writ of revivor, in the shape of an order that an issue be tried in any manner in which an issue in an action may be tried. As to these "manners" see Order XXXVI., Rule 2.

Rule 6.

Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or Judge may order such third person to appear, and state the nature and particulars of his claim upon such debt.

This is Rule 6 of the XLth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied from section 29 of the Common Law Procedure Act, 1860.

The garnishee may have a *bonâ fide* doubt as to whether some third party, and not the judgment debtor, is really entitled to the debt. The present Rule enables the garnishee to resolve this doubt by a judicial decision, obtained by taking out a summons, in the nature of an interpleader summons, calling on such third person to appear before the Judge and state the nature of his claim. (See next Rule.)

Rule 7.

After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the Court or Judge may order to appear, or in case of such third person not appearing when ordered, the Court or Judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding Rules of this order, and may bar the claim of such third person, or make such other order as such Court or Judge shall think fit, upon such terms, in all cases, with respect to the lien or charge

* Like Order XLII., Rule 19.

(if any) of such third person, and to costs, as the Court or Judge shall think just and reasonable.

This is Rule 7 of Order XL. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied from the 30th section of the Common Law Procedure Act, 1860.*

This Rule provides for a summary adjudication by the Judge upon the claims of a third party to liens and charges upon debts sought to be attached by the execution creditor, and gives a power of barring such claims, *i.e.*, claims to such liens and charges, as between such third person and the garnishee, but not of barring a debt claimed by such third person against the execution debtor.†

Rule 8.

Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside or the judgment reversed.

This is Rule 8 of the XLth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The Rule is copied *verbatim* from the 65th section of the Common Law Procedure Act, 1854.

See a form of plea of payment to a judgment creditor of the plaintiff under an order of attachment of debt in Bullen and Leake's "Precedents," 3rd edn., p. 494, and in *Lockwood v. Nash*, 18 C. B. 536.

Rule 9.

There shall be kept by the proper officer a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered, and otherwise; and copies of any entries made therein may be taken by any person upon application to the proper officer.

This is Rule 9 of the XLth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The Rule is founded on section 66 of the Common Law Procedure Act, 1854, which, however, provides for the keeping of three debt attachment books at the offices of the Masters of Q. B., C. P. & Ex. (See Notanda.)

Section 92 of the Principal Act would provide for the transfer to the Supreme Court of these three debt attachment books.

* For an instance of the application of this section, see *Mitchell v. Lee*, L. R. 2 Q. B., 259.

† Day's Common Law Procedure Acts, p. 371.

Rule 10.

The costs of any application for an attachment of debts, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court or a Judge.

This is Rule 10 of the XLth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The Rule is copied *verbatim* from the 67th section of the Common Law Procedure Act, 1854.*

ORDER XLVI.

CHARGING OF STOCK OR SHARES AND DISTINGUISHING.

Rule 1.

An order charging stock or shares may be made by any Divisional Court, or by any Judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by 1 & 2 Vict., c. 110, secs. 14 and 15, and 3 & 4 Vict., c. 82, sec. 1.

This is Rule 1 of the XLth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

A Chancery Judge will have jurisdiction to enforce a Common Law judgment under this Rule. He had none before.†

The 14th section of the 1 and 2 Vict. provided as follows:—"If any person against whom any judgment shall have been entered up in any of Her Majesty's superior courts at Westminster shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the Superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order."

S. 15 provides as follows:—"Every order of a judge charging any government stock, funds, or annuities, or any stock or shares in any public company, under this Act, shall be made in the first instance *ex parte*,

* See *Wintle v. Williams*, 3 H. & N. 288.

† *Miles v. Pressland*, 4 My. & C.; 431. See also *Cragg v. Taylor*, L. R., 1 Ex., 148.

and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any government stock, funds, or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the Bank of England from permitting a transfer of such stock in the meantime and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorised agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, that unless the judgment debtor shall within a time to be mentioned in such order show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute; provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge any such order and to award such costs upon such application as he may think fit.*

S. 1 of the 3 and 4 Vict., c. 82, declared that *reversionary interests*, as well as interests in possession, and *the annual produce*, as well as the principal, should be chargeable under the 1 and 2 Vict., c. 110, that funds standing in the name of the Accountant-General should be chargeable, as if standing in the name of a trustee for the judgment debtor; but that the judge's order should not prevent the Bank of England from permitting a transfer of such last-mentioned funds as the Court of Chancery might direct.

Rule 2.

Any person claiming to be interested in any stock transferable at the Bank of England standing in the name of any other person may sue out a writ of distringas pursuant to the statute 5 Vict., c. 8, as heretofore. Such writ to be issued out of any office of the High Court in London where writs of summons are issued.

This is Rule 2 of the XLth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

* An appeal lies to the Court, after the order has been made absolute: *Fowler v. Churchill*, 2 Dowl., N. S., 562.

"C. 8" is an *erratum*. It should be "c. 5."

The 5 Vict. c. 5, provides as follows:—

"It shall be lawful for the Court of Chancery, upon the application of any party interested, by motion or petition, in a summary way without bill filed, to restrain the governor and company of the Bank of England, or any other public company, whether incorporated or not, from permitting the transfer of any stock in the public funds, or any stock or shares in any public company which may be standing in the name or names of any person or persons, or body politic or corporate, in the books of the governor and company of the Bank of England, or in the books of any such public company, or from paying any dividend or dividends due or to become due thereon; and every order of the Court of Chancery upon such motion or petition as aforesaid, shall specify the amount of the stock or particular shares to be affected thereby, and the name or names of the person or persons, body politic or corporate, in which the same shall be standing: provided always, that the Court of Chancery shall have full power, upon the application of any party interested, to discharge or vary such order, and to award such costs upon such application as to the said Court shall seem fit. A writ of distringas, in the form set out in the first Schedule to this Act, shall be issuable from the Court of Chancery, and shall be sealed at the *subpœna* office."

The form contained in the first Schedule is as follows:—

"Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriffs of London, greeting: We command you that you omit not, by reason of any liberty, but that you enter the same and distrain the governor and company of the Bank of England by all their lands and chattels in your bailiwick, so that they or any of them do not intermeddle therewith until we otherwise command you; and that you answer us the issues of the said lands, so that they do appear before us in our High Court of Chancery on the _____ day of _____, to answer a certain Bill of Complaint lately exhibited against them and other defendants before us in our said Court of Chancery by _____ complainant; and further to do and receive what our said Court shall then and there order in the premises. Witness ourself at Westminster, the _____ day of _____ in the _____ year of our reign.

"DEVON."

The practice is prescribed by Order XXVII. of the Consolidated Orders of the Court of Chancery.*

ORDER XLVII.

WRIT OF SEQUESTRATION.

Where any person is by any judgment directed to pay money into Court, or to do any other act in a limited time, and after due service of such judgment refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment shall, at the expiration

* See Morgan and Chute's Chancery Acts and Orders, pp. 508-510.

of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery has heretofore had, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration have heretofore been dealt with by the Court of Chancery.

As to the rise and progress of sequestration, see North's *Life of Lord Guildford*, vol. II., p. 73. As to the struggles of the Common Law Courts against sequestration, see Hinde, 128, Gilbert, *For. Rom.* 78, 3 Swanston, 279 n.

This Order is Order XLVI. of the Rules of Court, drawn up in 1874, under the Principal Act.

This Order is a step towards fusing law and equity. It is taken from the 3rd Rule of the Chancery Order of the 7th January, 1870, which repeals (Rule 2) the Consolidated Order XXIX.

See a form of the writ of sequestration in Appendix (F), No. 10, which, from the words "Know ye" to the end, is an *exact copy* of the form hitherto in use in Chancery.

See also, as to this writ, Order XLII., Rules 2, 4 and 6.

The commissioners, of whom there are usually *four*, need not be professional persons, but care should be taken that they are persons able and willing to account for what comes into their hands; they are nominated by the party on whose behalf the writ is issued, and are allowed sometimes a poundage, sometimes a lump sum.

There are writs of sequestration on *mesne* process (to enforce appearance, &c.), and writs of sequestration on *final* process, to enforce decrees and orders. It is to the latter only that this Rule relates.

Originally the writ of sequestration was merely used as a means of coercing the defendant by keeping him out of possession of his property. The practice of applying the money received by the sequestration in satisfaction of the sum decreed to be paid is of comparatively modern origin. See *Wharam v. Broughton*, 1 Ves. Sen. 182. This, however, had become the usual method of proceeding in Chancery.* The decree or order served upon the defendant had an indorsement warning him that if he did not obey it within the time limited he would be liable to have his property sequestered.†

"Pay money into Court." By Order XLII., Rule 2, it is expressly provided that "a judgment for the payment of money into Court may be enforced by writ of sequestration."

"The proceeds may be dealt with, &c." The sequestrators, under the Chancery process, must not remove anything from the premises without the

* Daniel's *Chancery Practice*, p. 892.

† Order XXIII., 10, as varied by the Order of the 7th January, 1870.

special leave of the Court : * if they do, they will be liable to an attachment. † If a sale is wanted, an application for permission to sell must be made by summons or motion, and usually upon notice. ‡ The Court will order the sale of goods, § but not of terms of years, or any other property the title to which passes otherwise than by delivery, as the sequestrators can give no warranty of title. ||

The sequestrators should serve the tenants in possession with a notice to attorn and pay their rents to them. ¶ The Court will, upon motion with notice, give the sequestrators power to let the land. ** They are bound to make returns from time to time to the Court of what comes into their hands, †† and they may be ordered, on motion with notice, to pass their accounts and pay over their balances. ‡‡ The persons desirous of having the proceeds of the sequestration applied under the decree or order must move the Court for that purpose: the sequestrators ought not so to apply the proceeds of their own authority. §§

The person whose property is sequestered can, on clearing his contempt, obtain an order or summons to dissolve the sequestration. ||||

ORDER XLVIII.

WRIT OF POSSESSION.

Rule 1.

A judgment that a party do recover possession of any land may be enforced by writ of possession in manner heretofore used in actions of ejectment in the Superior Courts of Common Law.

This is Rule 1 of the XLIIIrd Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

See a form of this writ (called a writ of *ha. fa.* or of *hab. fac. poss.*) Appendix (F), No. 7. It is copied *verbatim* from the word "therefore" to the end from the form given in the Schedule to Reg. Gen. Hil. T., 1853, No. 23. By Order XLII., Rule 3, "a judgment for the recovery of land may be enforced by writ of possession."

This is the only form of writ in Appendix (F) to this Schedule which contains the *non omittas* clause peculiar to writs issuing out of the Exchequer.

This Rule does not affect s. 187 of the Common Law Procedure Act, 1852, which is therefore still law.

If there be several tenements in the possession of several tenants, the sheriff must deliver possession of each separately; but if there be several tenements in the possession of one tenant, possession may be given of one

* *Lord Pelham v. Duchess of Newcastle*, 3 Swanst. 290 n.

† *Hales v. Shaftoe*, 1 Ves. Jun. 86. ‡ *Mitchell v. Draper*, 9 Ves. 208.

§ *Wharam v. Broughton*, 1 Ves. Sen. 180.

|| *Sutton v. Stone*, 1 Dick. 187. ¶ See *Shaw v. Wright*, 3 Ves. 22, 24.

** *Neale v. Bealing*, 3 Swanst. 304. †† *Desbrow v. Crommie*, Bainb. 272.

‡‡ *Hinde*, 138. §§ 1 Newl., 689.

|||| See *Rawlinson v. Stringer*, Reg. Lib. B. 2,507.

in the name of the whole. In order to save the expense of executing this writ, the tenants may attorn to the plaintiff.*

This Rule and Order XLII., Rule 3, do not provide for the case of a judgment in ejectment for the defendant. It is apprehended that the 183rd section of the Common Law Procedure Act, 1852, as to the issuing of execution for the defendant's costs in such a case is still, therefore, applicable.

Rule 2.

Where by any judgment any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment, and that the same has not been obeyed.

This is Rule 2 of the XLVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The former practice is laid down by the 182nd, 183rd and 215th sections of the Common Law Procedure Act, 1852.

"Without any order." None was necessary under the old practice.

"Filing an affidavit." This was not requisite under the old practice. Order XLII., Rule 15, empowers the party to whom *money is payable* under a judgment to issue *immediate execution*; this Rule would appear to give a similar power to issue *immediate execution*, the only difference being that an affidavit is not necessary under Order XLII., Rule 15, but under this Rule it is.

ORDER XLIX.

WRIT OF DELIVERY.

A writ for delivery of any property other than land or money may be issued and enforced in the manner heretofore in use in actions of detinue in the Superior Courts of Common Law.

This is Order XLIV. of the Rules of Court, drawn up in 1874, under the Principal Act.

See forms of this writ Appendix (F), No. 8. They are copied from the Schedule to the Reg. Gen. Mich. Vac., 1854, Nos. 34 and 35, leaving out the *non omittas* clause and the allusion to the stat. 2 Vict. An asterisk should be inserted in the first of the two forms after the words "our said Court." See the instructions to the second of the two forms.

Order XLII., Rule 4, prescribes this writ as one of the alternative methods by which the recovery of specific goods may be enforced. The law on this subject will be found in section 78 of the Common Law Pro-

* Archbold's Practice, pp. 1,045, 1,046.

cedure Act, 1854 :—"The Court or a Judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed; and that, if the said chattel cannot be found, and unless the Court or a Judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, till the defendant render such chattel; or at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel: provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs and interests in such action."

To entitle the plaintiff in detinue to a writ of delivery under this section, the Jury must assess the value of the chattel. The Court may review the order of the Judge under this section. The Courts of Common Law are clothed by this section (which is now incorporated in this Act), after judgment in an action of detinue, with the same jurisdiction to compel the return of a chattel as the Court of Chancery.*

The jurisdiction of the Court of Chancery is fully explained in White and Tudor's Leading Cases in Equity.† The Court of Chancery will order the return of specific chattels where the chattels have a *pretium affectionis* to the owner, e.g., heir-looms, articles of curiosity or antiquity, and family pictures; also title-deeds and copies of court rolls;‡ also articles destitute of peculiar value, in the case where a fiduciary relationship exists between the parties.§

The Common Law Judges will now be able to enforce the delivery up of specific chattels by *attachment* and *sequestration*, as well as by this writ (Order XLII., Rule 4).

ORDER L.

CHANGE OF PARTIES BY DEATH, &c.

Rule 1.

An action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation or devolution of any estate or title *pendente lite*.

This Rule is a re-enactment of Rule 17 of the Principal Act.

By the 135th section of the Common Law Procedure Act, 1852, it is enacted that the *death* of a plaintiff or defendant shall not cause the action

* See also, as to enforcing the specific delivery of goods contracted to be sold, the Mercantile Law Amendment Act, 1856, s. 2.

† *Pusey v. Pusey*, 1 White & Tudor, 820. In one case a club tobacco box was ordered to be delivered up by an ex-officer of the club, *Fells v. Read*, 3 Ves., 79.

‡ *Brown v. Brown*, 1 Dick., 62.

§ *Wood v. Rowcliffe*, 3 Hare, 304.

to abate, but it may be continued as thereafter "mentioned." It has been held that this enactment only applies where the cause of action would before it have *survived* to the legal representative, and he could have commenced an action in his representative character. (*Flinn v. Perkins*, L.J. 32 Q.B. 10, B. C., Crompton, J.)

By s. 141 of the Common Law Procedure Act, 1852, "the marriage of a woman plaintiff or defendant shall not cause the action to abate, but the action may, notwithstanding, be proceeded with to judgment."

S. 142 of the Common Law Procedure Act provides in effect that, if the assignees (now trustee) in bankruptcy are (is) willing to continue the action, the bankruptcy of the plaintiff *pendente lite* shall not cause the action to abate.

In Chancery, oddly enough, there were no similar enactments, and on the death or bankruptcy of the plaintiff or defendant, or the marriage of the plaintiff or defendant if a female, the suit abated. If, however, there were several plaintiffs or several defendants, and the whole interest of the party dying survived to the co-plaintiffs or co-defendants, as in the case of joint tenants suing or being sued and one dying, the suit did not abate, but might have been continued by or against the survivor, without revivor.* A suit in equity might also become defective by the assignment or creation of an estate or title *pendente lite*, or by its devolution on *e.g.* a new-born child.

The method of curing the defect or abatement was formerly by bill of revivor, but latterly by an order of course, obtained on exhibiting counsel's brief, under the provisions of section 52 of the Chancery Amendment Act.

At Common Law abatement by death was cured by a suggestion of the death upon the record, after which the proceedings were continued by or against the legal representative of the party deceased. If the cause of action survived to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, no leave was necessary,† and either party might make the suggestion; but in the case of the death of a *sole plaintiff*, or sole surviving plaintiff, the leave of the Court or of a Judge had to be obtained by his legal representative before entering the suggestion. If the *sole defendant* died, it was the plaintiff's turn to make the suggestion, and he had to serve it on the legal representative of the deceased defendant, who then appeared and pleaded to the suggestion, or suffered judgment for default of appearance. If he appeared, the pleadings in the action and upon the suggestion were tried together.‡

If a female plaintiff married *pendente lite*, execution might be issued by the authority of the husband, without any suggestion or writ of revivor: if a female defendant married *pendente lite*, execution might be issued against her alone, or by suggestion or writ of revivor, against her and her husband.§

To enable the assignees of a bankrupt to continue an action commenced by him before becoming bankrupt, it was necessary for the assignees to obtain a Judge's order for the purpose, and to give security for costs.||

* *Fallowes v. Williamson*, 11 Ves., 306, 309; *Boddy v. Kent*, 1 Mer., 361, 364.

† Common Law Procedure Act, 1852, s. 136.

‡ *Ib.*, s. 138.

§ *Ib.*, s. 141. || *Ib.*, s. 142.

The Legislature, while adopting the Common Law rule that an action shall not abate by reason of the death, marriage, or bankruptcy of any of the parties, *if the cause of action survive*, has, at the same time, adopted the simple form of procedure for substituting for the deceased or the bankrupt, the legal representative or assignees respectively, or for adding the husband, as the case may be, provided by s. 52 of the Chancery Amendment Act, 1852.

Rule 2.

In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to an action, the Court or a Judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party to the action, or be served with notice thereof in such manner and form as hereinafter prescribed, and on such terms as the Court or Judge shall think just, and shall make such order for the disposal of the action as may be just.

This Rule is a re-enactment of the second part of Rule 17 of the Principal Act, "as hereinafter prescribed" being substituted for "as may be prescribed by Rules of Court," in order to adapt the Rule to the present Act.

"If it be deemed necessary." As the action is no longer to abate, as it formerly did *in equity*, it might be presumed that the action would proceed as if the death, marriage, or bankruptcy, &c., had never occurred. It may, however, be necessary for the Court or Judge to bring the successors in interest before them or him, and, in such case, the present Rule will become applicable.

"As hereinafter prescribed," *i.e.*, by Rule 5 of this Order.

Rule 3.

In case of an assignment, creation, or devolution of any estate or title *pendente lite*, the action may be continued by or against the person to or upon whom such estate or title has come or devolved.

This Rule is a re-enactment of the third part of Rule 17 of the Principal Act.

See Rule 1 of this Order, *supra*.

S. 52 of the Chancery Amendment Act, 1852, applied to such a "devolution" as this Rule mentions.

Rule 4.

Where by reason of marriage, death, or bankruptcy, or any other event, occurring after the commencement of an action, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action, and such new party or parties, may be obtained *ex parte* on application to the Court or a Judge, upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence.

This is Rule 1 of the XLVth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

There seems, at first sight, to be some tautology between this Rule and Rule 2 of this Order, *supra*, but it will be seen, on closer examination, that Rule 2 gives the Court or a Judge power, *mero motu*, to make an order; the present Rule gives the Court or a Judge power to make an order only on an application *ex parte*. This really seems to be the only difference, except that under Rule 2 service is in the discretion of the Judge. Under this Rule it is compulsory, unless the Court or Judge otherwise direct. The 2nd Rule is new; this Rule is modelled on the 52nd section of the Chancery Amendment Act, 1852.

Rule 5.

An order so obtained shall, unless the Court or Judge shall otherwise direct, be served upon the continuing party or parties to the action, or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall, from the time of such service, subject nevertheless to the next two following Rules, be binding on the persons served therewith; and every person served therewith, who is not already a party to the action, shall be bound to enter an

appearance thereto within the same time and in the same manner as if he had been served with a writ of summons.

This is Rule 2 of the XLVth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is taken from s. 52 of the Chancery Amendment Act, 1852.

The words "unless the Court or a Judge shall otherwise direct," confer a power to dispense with service which that enactment withheld.

Rule 6.

Where any person who is under no disability, or under no disability other than coverture, or being under any disability other than coverture, but having a guardian *ad litem* in the action, shall be served with such order, such person may apply to the Court or a Judge to discharge or vary such order at any time within 12 days from the service thereof.

This is Rule 3 of the XLVth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is taken from Order XXXII., Rule 1, of the Consolidated Orders of the Court of Chancery.

Rule 7.

Where any person being under any disability other than coverture, and not having had a guardian *ad litem* appointed in the action, is served with any such order, such person may apply to the Court or a Judge to discharge or vary such order at any time within 12 days from the appointment of a guardian or guardians *ad litem* for such party; and until such period of 12 days shall have expired, such order shall have no force or effect as against such last-mentioned person.

This is Rule 4 of the XLVth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied almost *verbatim* from Order XXXII., Rule 1, of the Consolidated Orders of the Court of Chancery.

ORDER LI.

TRANSFERS AND CONSOLIDATION.

Rule 1.

Any action or actions may be transferred from one Division to another of the High Court, or from one Judge to another of the Chancery Division, by an order of the Lord Chancellor, provided that no transfer shall be made from or to any Division without the consent of the President of the Division.

See s. 36, and also Rule 41 of the Schedule to the Principal Act, and also s. 11 of this Act.

The present Rule is Rule 1 of the XLVIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

Under the former Chancery practice an order for the transfer of the cause from one branch of the Court to another was made, whenever there was a probability of convenience from doing so.*

The Order was made upon motion with notice,† but the consent of the Judge from whom and to whom the cause was to be transferred, and the leave of the Lord Chancellor, or of the Lords Justices,‡ to give notice of the motion, must have been first obtained. The consent and leave were usually given as a matter of course, on the *ex parte* application of counsel. When leave was given, the motion was placed in the Court paper for the day appointed for the hearing. The order of transfer, when passed and entered, was left with the Record and Writ Clerk for entry in his cause-book.§ A party who, on insufficient grounds, refused to consent to the transfer, might have been ordered to pay the costs of the application.||

The Lord Chancellor or the Lords Justices had power to order the re-transfer of transferred causes.¶

Leave, it will be seen, can only be obtained in future from the Lord Chancellor; the Lords Justices are removed to the Court of Appeal by s. 4, *supra*.

The power of the Lord Chancellor to order the transfer of a cause from one Common Law Division to another is, of course, entirely new. As, under the old practice, the consent of the Chancery Judges from whom and to whom the cause was to be transferred, was necessary, so in future the consent of the Presidents of the Divisions from which and to which an action is to be transferred by order of the Lord Chancellor, will be necessary. Actions can be transferred, however, from one Division of the Supreme Court to another Division of it without the assent of the Lord Chancellor under Rule 2 of this Order; but it would seem that a transfer of an

* *Curlewis v. Whidborne*, 10 W. R. 261, L. J. J.

† *Bond v. Barnes*, 2 De G. F. and J. 387.

‡ "The cause, unless removed by some special order of the Lord Chancellor and Lords Justices, shall be attached to the Court of the M.R. or of one of the Vice-Chancellors"; Order VI., Rule 1, of the Consolidated Orders.

§ Braithwaite's Pr. 566.

|| *Cocq v. Hunasgeria Coffee Co.*, L. R. 4, Ch. 415.

¶ *Seton*, 1269; *Sidebottom v. Sidebottom*, 7 W. R. 104, L. C.

action from one *Judge* of the Chancery Division to another *Judge* of that Division can only be effected by an order of the Lord Chancellor. Nothing is said of the consent in this case of the Judges to whom and from whom the action is transferred; but it may be assumed that this will still be necessary.

Rule 2.

Any action may, at any stage, be transferred from one Division to another by an order made by the Court or any Judge of the Division to which the action is assigned: Provided that no such transfer shall be made without the consent of the President of the Division to which the action is proposed to be transferred.

See Rule 41 of the Principal Act.

The present Rule is Rule 2 of the XLVIth Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

Section 11 of this Act gives an option to the plaintiff as to the Court in which he is to sue. If he exercises this option wrongly, *e.g.*, if he assigns to one Division of the Court an action over the subject-matter of which another Division has exclusive cognisance—a suit for specific performance, for instance, to the Court of Queen's Bench—the Court or any Judge of the Division to which the action has been so wrongly assigned, may, by the express provisions of subsection (2) of section 11, on a *summary application* at any stage of the cause or matter, direct the action to be transferred to the Division to which it ought to have been assigned.

Proceedings in the wrong Division prior to the transfer are, however, declared to be as *valid* as if they had been taken in the proper one. The Court or Judge of the wrong Division may, moreover, set matters right by expressly *retaining* the action in that Division.*

Under Rule 1 of this Order the consent of the President of the Division from which the action is transferred is required, as well as the consent of the President of the Division to which the action is transferred. Under the present Rule a *puise* Judge may order the action to be transferred without consulting his chief.

Rule 3.

Any action transferred to the Chancery Division or the Probate Division shall, by the order directing the transfer, be directed to be assigned to one of the Judges of such Division to be named in the order.

This Rule is Rule 3 of the XLVIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is in accordance with the previous practice of the Court of

* This is also provided for by s. 36 of the Principal Act.

Chancery, and also with the provisions of s. 42 of the Principal Act, that "all business arising in the Chancery Division shall be transacted and disposed of in the first instance by one judge only."

Rule 4.

Actions in any Division or Divisions may be consolidated by order of the Court or a Judge in the manner heretofore in use in the Superior Courts of Common Law.

This is Rule 4 of the XLVIth Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

When several actions are brought by *the same plaintiff* against several defendants, and *the questions in dispute and the evidence* to be adduced are *the same* in all, the plaintiff will be put to his election as to which action he will proceed with, and proceedings in the rest will be stayed on the defendants in the other actions submitting to be bound by the verdict in the one to be tried. The practice of thus "consolidating" actions is said to have been originally introduced by Lord Mansfield, C.J., in actions against underwriters.*

Actions will not be consolidated where there are several plaintiffs and one defendant.†

The plaintiff will not be prevented by an adverse verdict in the case that is tried from proceeding with any of the other actions,‡ even although the costs in the first are unpaid.§ Where the same solicitor is retained by all the defendants, they are jointly liable to contribute to the payment of the plaintiff's costs.||

A practice somewhat similar to that of the Common Law Courts was sanctioned by the Court of Chancery. Where two suits for the *same object* were instituted in different branches of that Court, an application was generally entertained to stay proceedings in one. If it was desirable to amalgamate the two suits, the Court would do so on conditions.¶ A defendant in Equity may plead that there is another suit depending in that or in another Court of Equity for the same matter.**

ORDER LII.

INTERLOCUTORY ORDERS AS TO MANDAMUS INJUNCTIONS††
OR INTERIM PRESERVATION OF PROPERTY, &c.

Rule 1.

When by any contract a *primâ facie* case of liability is

* Tidd 614, 9th edn. † *Nichols v. Lefevre*, 3 D.P.C., 135. *Westbrook v. Australian Steam Navigation Company*, 14 C.B., 113. ‡ *McGregor v. Horsfall*, 3 M. & W., 320.

§ *Doyle v. Douglas*, 4 B. & Ad., 544.

|| *Anderson v. Boynton*, 13 Q.B., 308.

¶ See Morgan and Chute's Chancery Acts and Orders, p. 393.

** Mitford on Pleading, 246.

†† See the note at p. 59, as to the extraordinary title to this Order.

established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation or *interim* custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured.

This Rule is a re-enactment of Rule 43 of the Principal Act.

This Rule must be read with Rule 1, *infra*.

Rule 3 seems to include any case which could fall under this Rule,* although, oddly enough, an *affidavit* may be required under this Rule and not under Rule 3. (See Rule 5.)

The existing law as to the subject-matter of this Rule will be found stated under Rule 3.

Rule 2.

It shall be lawful for the Court or a Judge, on the application of any party to any action, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as to the Court or Judge may seem desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once.

This Rule is a re-enactment of Rule 44 of the Principal Act.

The Rule appears to be new. (But see Notanda.)

Rule 3.

It shall be lawful for the Court or a Judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the DETENTION, PRESERVATION, OR INSPECTION of any property, being the subject of such action, and for all or any of the purposes aforesaid to authorise any person or persons to enter upon or into any land or building in the possession of any party

* Instances of such seemingly tautological enactments are not unfrequent in this Schedule: See Order XXVII., Rules 1 and 6; Order XXXI., Rules 11, 12 and 14; Order XXXIV., Rules 1 and 2, *supra*.

to such action, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

See Rule 5 of this Order. The present Rule is a re-enactment of the first portion of Rule 45 of the Principal Act. The second portion of that Rule will be found, *supra*, under Order XXXVII., Rule 4.

This Rule is very wide and beneficial in its scope.

The application may be made by the plaintiff at any time after the writ of summons has been issued; by the defendant, or any other party, at any time after appearance by him. (See next Rule.) No affidavit appears to be necessary under this Rule.

“Detention.”—This is more fully expressed in Rule 1 of this Order—“the Court or a Judge may make an order for the *interim* custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured.” The “*interim custody*” would point to the nomination of a Receiver *pendente lite*, to secure the property for the benefit of the person who shall ultimately appear to be entitled to it, without affecting the right to it.* The Court of Chancery extended the principle of providing for the safety of property pending litigation by the appointment of a Receiver to cases where the litigation was in another Court; *e.g.*, in the Probate Court,† the Divorce Court,‡ or a foreign Court.§ The Probate Court (see the Probate Act, 1857, s. 71), and the Divorce Court will in future, it is apprehended, appoint the Receiver in these cases themselves.

One of the most ordinary methods by which the Court of Chancery enforced the jurisdiction of retaining property *pendente lite* was by ordering it to be *brought into Court*. The payment of money or the transfer of stock into Court was most usually ordered, on interlocutory application, in the case of persons filling a fiduciary position having money in their hands or stock under their control to which the plaintiff could make out a *prima facie* title.|| (See Rule 1.)

The Court of Chancery would also, wherever it might be necessary for their protection, order specific chattels to be deposited in the Bank of England, which has the general custody of the property of suitors.¶

“Preservation.”—An interlocutory injunction was a mode by which the Court preserved the property in dispute *pendente lite*, with the least injury to all parties. The object of this injunction is to maintain the subject-matter of the suit in *statu quo* until a decision could be had on the legal

* See *Skip v. Harwood*, 3 Atk., 564, per Lord Hardwicke, C. See also pp. 58—62.

† See Kerr on Receivers, 20—26. Mitford on Pleading, 193, 136.

‡ *Sydney v. Sydney*, W. N. (1867), 248.

§ *Transatlantic Company v. Pietroni*, Johns, 604.

|| *Danby v. Danby*, 5 Jur. N. S., 54. *Whitmore v. Turquand*, 1 J. & H., 296.

¶ Daniel's Chancery Practice, pp. 1,627, 1,628, 1,632.

right to it of the party suing.* The plaintiff must have shown at least a strong *prima facie* case in support of the title which he asserted.† (See Rule 1.) The Court would not, except under very special circumstances, have granted upon an interlocutory application before decree, a *mandatory* injunction, virtually directing the defendant to perform the act, so as to keep things, until the hearing, in the state in which they were *ante litem motum*.‡ Under the present Rule and subsection (8) of s. 25 of the Principal Act, mandatory injunctions will, no doubt, be more frequently applied for and obtained.

“Inspection.”—At Common Law a rule could have been obtained, directing a *view* to be had by a jury, whether common or special, of the messuages, lands, and place in question,§ in actions of a local nature, such as trespass *qu. cl. fr.*, and nuisances.|| No motion was necessary; the Rule being drawn up by the officer of the Court, on an affidavit, stating the place, and the distance, and on the deposit of an amount sufficient to cover the expenses of the view.¶

Either party to an action at Common Law might also have applied to a Court or a Judge for a Rule or an Order for the inspection by the jury, by himself, or by his witnesses, of any real or personal property the inspection of which might be material.** The proceedings were the same as on a view. The removal of obstructions to inspection might have been ordered as incident to it.††

The Court of Chancery also issued orders for the inspection of real property.‡‡

Under the 42nd sect. of the 15 and 16 Vict., c. 83, an order for the inspection of the defendant's machinery might have been made in an action for infringing a patent. The Court of Exchequer in *The Patent Type Founding Co. v. Lloyd*,§§ refused an order for the inspection and delivery, for the purpose of analysis, of a portion of the type used by the defendant. The order was subsequently made by the Court of Chancery.¶¶ Such a conflict of decision cannot arise in the Supreme Court.

Rule 4.

An application for an order under section 25, subsection 8, of the Act, or under Rules 2 or 3 of this Order, may be made to the Court or a Judge by any party. If the application be by the plaintiff for an

* *Lawrence v. Austin*, 11 Jur. N.S. 576, 577.

† Daniel's Chancery Practice, p. 1,487.

‡ See as to mandatory injunctions, Kerr on Inj., 230-232, 320-321, 533-535.

§ Common Law Procedure Act, 1852, s. 114.

|| *Stones v. Menhem*, 2 Ex. 382, per Parke, B.

¶ Reg. Gen. Hil. T., 1853, Rules 48 and 49.

** Common Law Procedure Act, 1854, s. 58.

†† *Bennett v. Griffiths*, 3 E. and E. 467.

‡‡ *Ednor v. Barwell*, 1 De G. F. and J., 529.

§§ 5 H. and N., 192.

¶¶ *Patent Type Founding Co. v. Walter, Johns*, 727.

order under the said subsection 8, it may be made either *ex parte* or with notice, and if for an order under the said Rules 2 or 3 of this Order, it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application.

This is Rule 1 of the XLVIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act, "Rules 2 and 3 of this Order" being substituted in two places for "Rules 44 and 45 of the Schedule to the Act" [of 1873], so as to adapt the Rule to the present Act.

No affidavit seems to be required by this Rule.

By subsection 8 of section 25 of the Principal Act (which, by the interpretation clause of this Schedule (LXIIIrd Order) is included in the expression "*the Act*"), a mandamus or an injunction may be granted, or a *Receiver appointed*, by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such an Order should be made.*

Rule 5.

An application for an order under Rule 1 may be made by the plaintiff at any time after his right thereto appears from the pleadings; or, if there be no pleadings, is made to appear by affidavit or otherwise to the satisfaction of the Court or a Judge.

This is Rule 2 of the XLVIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act, "Rule 1" being substituted for "Rule 43," in order to adapt the Rule to the present Act. (See note to Rule 1.)

Rule 6.

Where an action is brought to recover, or a defendant in his statement of defence seeks by way of counter-claim to recover specific property other than land, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property, by virtue of a lien or otherwise, as security for any sum of money, the Court or a Judge may, at any time after such last-mentioned claim

* This enactment has already been explained at pp. 58-62.

appears, from the pleadings, or, if there be no pleadings, by affidavit or otherwise to the satisfaction of such Court or Judge, order that the party claiming to recover the property be at liberty to pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as such Court or Judge may direct, and that upon such payment into Court being made, the property claimed be given up to the party claiming it.

This is Rule 3 of the XLVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule appears to be new. Under section 25 of the Common Law Procedure Act, 1860, a sum of money, to the value of the goods alleged to have been detained, might have been paid into Court by the defendant in an action of detainue.

ORDER LIII.

MOTIONS AND OTHER APPLICATIONS.

Rule 1.

Where by these Rules any application is authorised to be made to the Court or a Judge in an action, such application, if made to a Divisional Court or to a Judge in Court, shall be made by motion.

This is Rule 1 of the XLVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

By Order LVIII., Rule 18, applications to a Judge of the Court of Appeal shall also be by motion.

"Whenever," says Mr. Daniel, "it becomes necessary to apply to the Court for its interference in a matter arising in a cause or proceeding, the application is made by motion or *petition*."* "There does not appear," he adds, "to be any very distinct line of demarcation between the cases in which an application to the Court in a pending cause or matter should be made by motion and those in which it should be made by petition; but, as a general rule, where any long or intricate statement of facts is required, the application should be made by *petition*, while in other cases a motion will be sufficient."† The present Rule does not say that henceforth applications shall in no case be made by *petition* in the Chancery Division, but only that applications *under these Rules* shall be made by motion.

* Chancery Practice, p. 1,434.

† Citing *Jones v. Roberts*, 12 Sim., 189; and *Lord Shipbrooke v. Lord Hinchinbrooke*, 13 Ves., 394.

In the Common Law Courts the present Rule does not, it is apprehended, introduce any change of practice.

Rule 2.

No rule or order to show cause shall be granted in any action, except in the cases in which an application for such rule or order is expressly authorised by these Rules.

This is Rule 2 of the XLVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This is a very important change in Common Law practice. The Judicature Commission recommended* that "when the Judge at the trial has reserved any question of law, he should have power to direct the cause to be set down for argument before the Court *without a rule nisi*."

"In the Courts of Equity, the practice," says Dr. Stephen,† "has hitherto been to proceed, *in the first instance*, to a hearing of the parties on both sides, requiring, however, him by whom the motion is made to give notice‡ to his adversary of the nature and time of the intended application." The present Rule is an assimilation, *pro tanto*, of the Common Law to the Chancery practice. There were, however, "orders *nisi*" in Equity, and there were also at Common Law rules obtained upon motion, which were absolute in *the first instance*. The only general principle laid down by Common Law text writers on the subject was, that "all rules to *set aside proceedings* for irregularity or otherwise, were rules *nisi*."§

Cases in which the application for a Rule or Order to show cause has been "expressly authorised by these Rules" will be found in Order XXXIX., Rule 1, and Order XL., Rules 4, 5 and 6.

Under Rules 1, 2, 3, 7 and 8 of Order XL., it is apprehended, there will, on the other hand, be no rule or order to show cause. (See note, Order XL., Rule 2.)

Rule 3.

Except where by the practice existing at the time of the passing of the said Act any Order or Rule has heretofore been made *ex parte* absolute in the first instance, and except where by these Rules it is otherwise provided, and except where the motion is for a rule to show cause only, on motion shall be made without previous notice to the parties affected thereby. But the Court or Judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious

* First Report, p. 15.

† 3 Stephen's Comm., 7th edn., p. 628 n. (c.)

‡ Special *ex parte* motions were made *without* notice.

§ See Archbold's Practice, p. 1,578.

mischief, may make any order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or Judge may think just; and any party affected by such order may move to set it aside.

This is Rule 3 of the XLVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

Mr. Daniel says* that "it is impossible to lay down any clear rule defining such [special] motions as may be made *ex parte* in Equity, and distinguishing them from such as require notice." He gives, however, a list of motions which may be made *ex parte* in Appendix I., Part I., to his "Chancery Practice."

As to rules absolute in the first instance, at Common Law, see the note to Rule 2 of this Order, *supra*. A "motion of course" in Equity required no notice, as no opposition was allowed to it.† A list of these motions of course will be found in Daniel's "Chancery Practice," Appendix I., Part II.‡

Instances of rules absolute in the first instance are given by Reg. Gen. Hil. T., 1853, Rule 168.

Rule 4.

Unless the Court or Judge give special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion.

This is Rule 4 of the XLVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

By the Reg. Gen. Hil. T., 1853, Rule 160, "rules to show cause shall be no stay of proceedings unless *two days' notice of the motion shall have been served* on the opposite party, except in the cases of rules for new trials, or to enter verdict, or nonsuit, motions in arrest of judgment, or for judgment *non obstante veredicto*, to set aside award or annuity deed, or to enter a suggestion, or *by the special direction of the Court*." The present Rule sweeps away all the exceptions but the last. The Rule is copied *verbatim* from Order XXXIII., Rule 2, of the Consolidated Orders of the Court of Chancery.

Rule 5.

If, on the hearing of a motion or other application, the Court or Judge shall be of opinion that any person to

* Chancery Practice, p. 1,439.

† See *Eyles v. Ward*, Mos., 255.

‡ But petitions of course to the Rolls are now substituted for motions of course. See a list of such petitions, Daniel's Chancery Practice, Appendix II.

whom notice has not been given ought to have or to have had such notice, the Court or Judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given upon such terms, if any, as the Court or Judge may think fit to impose.

This is Rule 5 of the XLVIIIth Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

Rule 6.

The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or Judge shall think fit.

This is Rule 6 of the XLVIIIth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is rather ambiguously expressed. It may mean either that a *part heard* motion or application may be adjourned, or that the *making* of the motion or application may be postponed. The latter appears to be the true meaning. In Equity counsel might, as it was termed, "save" his notice of motion till the next motion or "seal" day.* If not made or "saved" before the Court had disposed of the motions on the day for which the notice was given, a motion was, in Equity, considered to be *abandoned*.† The present Rule was probably framed with a view to affording the parties an opportunity of postponing the notice of motion by arrangement.

Rule 7.

The plaintiff shall, without any special leave, be at liberty to serve any notice of motion or other notice, or any petition or summons upon any defendant, who, having been duly served with a writ of summons to appear in the action, has not appeared within the time limited for that purpose.

This is Rule 7 of the XLVIIIth Order of the Rules of Court drawn up in 1874 under the Principal Act.

This Rule is in accordance with the previous Chancery practice. It is copied almost *verbatim* from Order III., Rule 8, of the Consolidated Orders of the Court of Chancery. That Rule did not, however, apply where the defendant was out of the jurisdiction. *Green v. Pledger*, 3 Hare, 165.

* *De Bauwen Iron Company*, 17 Jur., 127.

† *Re Smith*, 23 Beav., 284. But see *Wedderburne v. Llewellyn*, 18 W. R., 939.

Rule 8.

The plaintiff may, by leave of the Court or a Judge to be obtained *ex parte*, serve any notice of motion upon any defendant along with the writ of summons, or at any time after service of the writ of summons, and before the time limited for the appearance of such defendant.

This is Rule 8 of the XLVIIIth Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

This is analogous to the previous Chancery practice. For "writ of summons" must, however, be read "copy of the Bill." See note to Order II., Rule 1 of this Schedule, pp. 277, 278.

"By leave."—Where a defendant in Equity had not appeared to the Bill, though duly served, and *the time limited* for doing so *had not expired*, leave to serve the notice upon him must first have been obtained.*

The words "has expired" must be understood to be added at the end of this Rule, in order to make sense.

ORDER LIV.

APPLICATIONS AT CHAMBERS.

Rule 1.

Every application at Chambers authorised by these rules shall be made in a summary way by summons.

This is Rule 1 of the XLIXth Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

Both at Common Law† and in Chancery‡ the mode of proceeding at Chambers has hitherto been by summons.

Rule 2.

In the Queen's Bench, Common Pleas, and Exchequer Divisions a Master, and in the Probate, Divorce, and Admiralty Division a Registrar, may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Act, or the Schedule thereto, or these Rules, may be transacted or exercised by

* Daniel's Chancery Practice, pp. 1442-3.

† Lush's Practice, p. 950. There were, however, several cases in which orders might be obtained upon *ex parte* application without summons, and with or without an affidavit. See a list of them in Lush's Practice, p. 949.

‡ 15 and 16 Vict., c. 80, s. 28.

a Judge at Chambers, except in respect of the following proceedings and matters ; that is to say,—

All matters relating to criminal proceedings or to the liberty of the subject :

The removal of actions from one Division or Judge to another Division or Judge :

The settlement of issues, except by consent :

Discovery, whether of documents or otherwise, and inspection, except by consent :

Appeals from District Registrars :

Interpleader, other than such matters arising in interpleader as relate to practice only, except by consent :

Prohibitions :

Injunctions and other orders under subsection 8 of section 25 of the Act, or under Order LII., Rules 1, 2 and 3, respectively :

Awarding of costs, other than the costs of any proceeding before such Master :

Reviewing taxation of costs :

Charging orders on stock, funds, annuities, or share of dividends or annual produce thereof :

Acknowledgments of married women.

This is Rule 2 of the XLIXth Order of the Rules of Court, drawn up in 1874 under the Principal Act, the words " Order LII., Rules 1, 2 and 3 " being substituted for " Rules 43, 44 and 45 of the Schedule to the Act " [of 1873], so as to adapt the Rule to the present Act.

This Rule is taken from the Reg. Gen. Mich. T., 1867, with some variations. It may be useful to compare the exceptions mentioned there with the exceptions mentioned in this Rule.

The exceptions mentioned in Reg. Gen. Mich. T., 1867, include several (*italicised*) which are omitted in this Rule:—" All matters relating to criminal proceedings; *the removal of causes from inferior Courts* other than the removal of judgments for the purpose of having execution; prohibitions and injunctions; *the referring of causes under the Common Law Procedure Act, 1854; the rectifying of omissions or mistakes in the register under the Joint Stock Companies Acts*; interpleader, other than such matters arising in interpleader as relate to practice only; discovery, whether by inspection of documents, interrogatories, or otherwise; reviewing taxation of costs; *staying proceedings after*

verdict; acknowledgments of married women; *leave to sue in forma pauperis*; orders for charging stock, funds, annuities, share or dividends, or annual produce thereof.”*

It will also be observed that there are several things which masters may now do *by consent*, which were formerly entirely excepted.

Rule 3.

If any matter appears to the Master proper for the decision of a Judge the Master may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the Master with such directions as he may think fit.

This is Rule 3 of the XLIXth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied from the Reg. Gen. Mich. T., 1867. See also Order XXXV., Rule 6, *supra*.

Rule 4.

Any person affected by any order or decision of a Master, may appeal therefrom to a Judge at Chambers. Such appeal shall be by summons, within four days after the decision complained of, or such further time as may be allowed by a Judge or Master.

This is Rule 4 of the XLIXth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

The first clause of this Rule is taken from “The Judges Chambers Despatch of Business Act, 1867” (30 and 31 Vict., c. 68) section 4. The second clause of the Rule is copied from the Reg. Gen., Mich. T., 1867.

See also Order XXXV., Rule 7.

Rule 5.

An appeal from a Master’s decision shall be no stay of proceeding unless so ordered by a Judge or Master.

This is Rule 5 of the XLIXth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is copied from the Reg. Gen. Mich. T., 1867.

See also Order XXXV., Rule 8, *supra*.

* The Reg. Gen. Mich. T., 1867, were made under the authority of the Judges Chambers (Despatch of Business) Act (30 and 31 Vict., c. 68).

Rule 6.

In the Queen's Bench, Common Pleas, and Exchequer Division [s], every appeal to the Court from any decision at chambers shall be by motion, and shall be made within eight days after the decision appealed against.

This is Rule 6 of the XLIXth Order of the Rules of Court drawn up in 1874 under the Principal Act.

See as to the subject-matter of this Rule sections 49 and 50 of the Principal Act and the notes thereto, pp. 110-114.

The Rule is in accordance with the previous Common Law Practice, except that the *time* within which the motion is to be made has not hitherto been defined; but the motion must have been made "within a *reasonable time*."*

Nothing is said in this Rule about the necessity of moving on *affidavits*. Under the old practice the application was made on an affidavit verifying a copy of the Judge's order.† The same affidavits, also, upon which the order was founded, might have been used on the application to set it aside.‡ The application might also, as a general rule, have been strengthened by additional affidavits.§ If the affidavits which were used at Chambers were intended to be used upon the motion, notice was given to the Judge's Clerk to produce them, and he thereupon handed them to the officer acting as Clerk of the Rules; but if he had already returned them to the Rule Officer, notice was given to the Clerk of the Rules to have them in Court.||

ORDER LV.

COSTS.

Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity: Provided, that where any action or issue is tried by a Jury, the costs shall follow the event,

* *Chapman v. King*, 4 D. and L. 311; *Meredith v. Gittans*, 19 L. T. (Q. B.) 59 E. T., 1852.

† *Hoby v. Pritchard*, 5 Dowl. 300.

‡ *Pickford v. Ewington*, 4 Dowl. 453.

§ *Peterson v. Davis*, 6 C. B., 235.

|| See *Needham v. Bristow*, 4 Sc., N. R., 733; 1 Dowl. N. S., 700; 4 M. and G., 262. (The practice will probably be the same under this Act.)

unless, upon application made at the trial, for good cause shown the Judge before whom such action or issue is tried or the Court shall otherwise order.

See as to costs, the "Additional Rules of Court," Order VI.

This Rule is a re-enactment of Rule 47 of the Principal Act, except the proviso at the end, which is due to Sir Henry James, and who carried it by way of amendment on the "report" of the Bill in the House of Commons.

The Judicature Commission in their First Report* stated, "that in the Court of Chancery, the Court of Admiralty, and the Courts of Probate and Divorce, the Court has, at present, full power over costs. We think that the absence of this power in the Courts of Common Law often occasions injustice and leads to unnecessary litigation." And they therefore recommended "that in all the Divisions of the Supreme Court the costs of the suit and of all proceedings in it should be in the discretion of the Court."

The framers of the Bill of 1873 followed the recommendation of the Judicature Commission, which they embodied in the 47th Rule of their Schedule.

Upon this subject Mr. Daniel† has the following pertinent explanatory remarks:—"The giving of costs in Equity is entirely discretionary. It must not be supposed, however, that the Court is not governed by definite principles in its decisions relative to the costs of proceedings before it. All that is meant by the *dictum* is, that the Court is not like the Common Law Courts held inflexibly to the Rule of giving the costs of suit to the successful party, but that it will, in dividing costs, take into consideration the circumstances of the particular case before it and the situation and conduct of the parties, and exercise its discretion with reference to those points. It does not, as is frequently supposed, act upon *the mere caprice of the Judge* before whom the cause happens to be tried."

The Common Lawyers in the House of Commons were, however, alarmed at the alteration in the fundamental law of trial by Jury, which the original Rule, standing out in its naked simplicity, would have involved. The whole policy of the Legislature from the Statute of Gloucester down to the 38th of the Queen, in reference to costs in trials by Jury was about to be sacrificed; accordingly, Mr. Morgan Lloyd, Q.C., Mr. Lopes, Q.C., and Mr. Grantham, gave notice of their intention to move the omission of the original Rule; and Sir Henry James, Q.C., took the milder course of giving notice of his intention to move to add the proviso which now forms part of the Rule. In Committee on the Bill the Attorney-General refused to give way, but at the last moment, on the report, he silently assented to Sir Henry's proviso, and it was added to the Rule. There can be no doubt that the change originally proposed in the awarding of costs at Common Law would have been too violent. It is not unworthy of notice that, as Sir Henry James originally drafted his amendment, it made the principle that "costs shall follow the event"

* P. 15.

† Chapter xxxi of his "Chancery Practice," "Costs," p. 1238.

‡ *Scarborough v. Burton*, 2 Atk. 111; *Benet College v. Carey*, 3 Bro. C.C. 390.

applicable to the trial of "any action or issue" by a jury. On the report, however, he altered his amendment into the following form:—

"Provided, that where any action or issue is tried by a Jury in the *Queen's Bench, Common Pleas, or Exchequer Division of the High Court*, the costs shall follow the event, unless upon special application and for good cause shown, the Judge before whom such action or issue is tried or the Court shall otherwise order."

The House of Lords did not like the amendment in this form, considering, no doubt, that the symmetry of the Bill would be spoilt if in trial by jury in three of the Divisions of the High Court the costs were to follow the event, and in trials by Jury in the other two Divisions, the costs were to be in the discretion of the Court; so their Lordships, when considering the Commons amendments, altered Sir Henry James's proviso back to its original form, and in that shape it became law.

See as to the costs of action tried by Jury following the event in the case of the plaintiff, 6 Edw. I. c. 1; in the case of the defendant, 23 Hen. VIII. c. 15, 4 Jac. I. c. 3, and 3 and 4 Wm. IV., c. 42, s. 32; as to the costs of issues in trials by Jury following the event, see the Common Law Procedure Act, 1852, s. 81, and Reg. Gen. Hil. T. 1853, Rule 62.

"Subject to the provisions of the Act," i.e., the 67th section of the Principal Act, which makes the 5th, 7th, 8th and 10th sections of the County Courts Act, 1867 (30 and 31 Vict. c. 142) applicable to "all actions commenced or pending in the High Court, in which any relief is sought which can be given in a County Court." The enactments referred to in s. 67 of the Principal Act are set out at full length in the note to that section, pp. 130–132 (which see.) The editors of the 13th edition of Roscoe's *Nius Prius* refer to the words, "Subject to the provisions of the Act," and say that "the provision herein referred to is s. 67. It will be seen that the [rule] is thus applied only to cases in which relief could not be obtained in a County Court. In all cases not within s. 67, the costs being in the discretion of the Court,* an order or certificate for costs will be required."

"But nothing herein contained," &c. Trustees, agents, and receivers, whether plaintiffs or defendants, accounting fairly, and paying their money into Court, are entitled to their costs out of the estate, which is the subject of the suit in Chancery, as a matter of course† and the same rule extends to personal representatives.‡ The Rule must be understood as applying strictly between themselves and their *cestuis que trustent*.

In suits between them and those who are strangers to their trust, the ordinary rules as to costs prevail.§ If the conduct of the party holding a fiduciary character is obviously vexatious, he will not be allowed his costs out of the estate,|| and if he is guilty of misconduct in the course of the suit, the Court will compel him to pay the costs of the suit out of his own pocket.¶

Where the owner of an estate proceeds to deliver it from a mortgage or other incumbrance which he himself or those under whom he claims have

* This was written before the proviso was added.

† *Attorney-General v. City of London*, 1 Ves. Jun., 243, 246.

‡ *Rashley v. Masters*, 1 Ves. Jun. 205.

§ Lewin on Trusts, 732.

|| *Cutreis v. Chandler*, 6 Madd. 123.

¶ *Sheppard v. Smith*, 2 Bro. P. C., 375.

put upon it, the mortgagee or incumbrancer will be allowed, as against the estate,* his costs, including all costs which he may have incurred in defending or asserting his title to it.† A mortgagee or other incumbrancer is, however, liable to forfeit his claim for costs by misconduct with reference to the suit, or the subject of it.‡

ORDER LVI.

NOTICES AND PAPER, ETC.

Rule 1.

All notices required by these Rules shall be in writing, unless expressly authorised by a Court or Judge to be given orally.

This is Rule 1 of the Lth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

By the Reg. Gen. Hil. T. 1853, Rule 161, *all notices* required by those Rules or by the practice of the Common Law Courts are to be *in writing*. The present Rule adopts this Rule, engrafting upon it, however, an important exception.

Rule 2.

Proceedings required to be printed shall be printed on cream-wove machine drawing foolscap folio paper, 19 lbs. per mill ream, or thereabouts, in pica type leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two inches and a half wide.

See Order V of the "Additional Rules of Court."

This is Rule 2 of the Lth Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

This Rule, which effects a considerable change in the practice at Common Law, is copied *verbatim* from Order IX, Rule 3, of the Consolidated Orders of the Court of Chancery.

Writs of summons are, by Order V, Rule 5, *supra*, directed to be printed "on paper of the same description as hereby directed in the case of proceedings directed to be printed."

Prior to the 15 & 16 Vict., c. 86, the practice was to engross Bills of Complaint in Chancery on *parchment*. That enactment expressly provided that this practice should be "discontinued." Thenceforth Bills have been printed. At Common Law the practice has hitherto been to engross the declaration,§ and pleas on "plain paper,"|| but to engross the writ

* *Detillin v. Gale*, 7 Ves. 583.

† *Hunt v. Fownes*, 9 Ves. 70.

‡ *Francklyn v. Fern*, Barnard, 30.

§ It was no objection that it was partly written and partly printed; *Brand v. Rich*, 2 Moore, 654.

|| Archbold's Practice, 232, 289.

of summons, on the other hand, on *parchment*,* which has the great advantage of being a durable substance, not liable to be torn or destroyed while undergoing frequent manipulations.†

Rule 3.

Any affidavit may be sworn to either in print or in manuscript, or partly in print and partly in manuscript.

This is Rule 4 of the Lth Order of the Rules of Court, drawn up in 1874, under the Principal Act, the words "or partly in print and partly in manuscript" being (very usefully) added at the end.

This was originally Rule 3 of the Order. No fewer than 7 Rules of this Order (of which there were originally 10) were struck out in committee on the Bill in the House of Commons. Rule 8 of this Order was opposed by Mr. Gregory on behalf of the Incorporated Law Society.‡

ORDER LVII.

TIME.

Rule 1.

Where by these Rules, or by any judgment or order given or made after the commencement of the Act, time

* Archbold's Practice, p. 198.

† FORMS of Writs of Summons and of other printed proceedings under these Acts can be obtained of Messieurs WATERLOW AND SONS, 66, LONDON WALL, CITY; 24, Birchin Lane, City; and 49, Parliament Street, Westminster.

‡ As a matter of antiquarian interest, it may not be out of place to insert here the rejected Rules. They may possibly reappear, indeed, in an amended form:—"3. Where by the Act or these Rules, or by any order of the Court (whether of appeal or otherwise) or a Judge, any pleading or evidence or other document is ordered to be printed by any party, such party shall, upon request and upon payment therefor at the rate of *halfpenny per folio* of 72 words, deliver any number of copies not exceeding 10 to any party.

"5. Every affidavit filed under a consent to take the evidence in an action by affidavit, shall, unless the Court or a Judge shall otherwise order, be printed under the direction of the officer with whom it is filed, in the same manner in which affidavits have heretofore been printed under the direction of the Record and Writ Clerks in the Court of Chancery.

"6. Any affidavit, other than those mentioned in the last Rule, may be printed in manner thereby provided, if all the parties interested consent thereto, or the Court or a Judge so order.

"7. The party filing an affidavit required or ordered to be printed, shall leave with the officer with whom it is filed a fair copy thereof, such copy to be written on draft paper on one side only.

"8. Any party requiring a copy of any affidavit filed by any other party shall *take an office copy*.

"9. An office copy of any affidavit required or ordered to be printed under these Rules shall be a printed copy.

"10. The party filing any affidavit required or ordered to be printed

for doing any act or taking any proceeding is limited by months, not expressed to be lunar months, such time shall be computed by calendar months.

This is Rule 1 of the LIst Order of the Rules of Court, drawn up in 1874, under the Principal Act.

By Order XXXVII., Rule 10 of the Consolidated Orders of the Court of Chancery, "where the time for doing any act or taking any proceeding is limited by months, not expressed to be calendar months, such time shall be computed by *lunar* months of 28 days each." This, it will be perceived, is the exact converse of the present Rule, so that the system of computing months in Chancery will be entirely changed. The change will not be confined, however, to Chancery practice, for in legal proceedings generally a month is 28 days, or four weeks. *Tullet v. Linfield*, 3 Burr. 455, 1 W. Bl. 450; *Soper v. Curtis*, 2 Dowl., 237.

The present Rule follows the 13 and 14 Vict., c. 21, s. 4, by which it is declared that "in all Acts of Parliament the word 'month' is to be taken to mean *calendar* month, unless words be added showing that lunar month is intended."

Rule 2.

Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time.

This is Rule 2 of the LIst Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

This Rule is copied *verbatim* from Order XXXVII., Rule 11 of the Consolidated Orders of the Court of Chancery.

Rule 3.

Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceedings shall, so far as regards the time of doing or taking the same, be held to be duly done or taken, if done or taken on the day on which the offices shall next be open.

This is Rule 3 of the LIst Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

shall take a printed office copy, paying therefor at the rate of *two pence per folio*.

"Every other printed office copy shall be paid for at the rate of *one penny per folio*."

(See the "Additional Rules of Court," *infra*.)

This Rule is copied *verbatim* from Order XXXVII., Rule 12, of the Consolidated Orders of the Court of Chancery.

Rule 4.

No pleadings shall be amended or delivered in the Long Vacation, unless directed by Court or a Judge.

This is Rule 4 of the LIst Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

The Long Vacation commences on the 10th of August, and terminates on the 24th of October (Order LV., Rule 2).

The 2 Wm. IV., c. 39, provided that no plea should be delivered between the 10th of August and the 24th of October. A plea delivered within this period was a nullity, and the plaintiff might, after the time for pleading had expired, sign judgment.*

Rule 5.

The time of the Long Vacation shall not be reckoned in the computation of the times appointed or allowed by these Rules for filing, amending, or delivering any pleading, unless otherwise directed by a Court or a Judge.

This is Rule 5 of the LIst Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule is taken from Order XXXVII., Rule 13, of the Consolidated Order of the Court of Chancery, the word "Long" being, however, inserted before "Vacation," so as to restrict the operation of the Rule.

Rule 6.

A Court or a Judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed.

This is Rule 6 of the LIst Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

This Rule is taken from Order XXXVII., Rules 17 and 18, of the Consolidated Orders of the Court of Chancery, but it is more liberal than those Rules in its concluding proviso, as they require that a second application for an enlargement of time shall be made before the expiration of the time previously allowed.

* The vesting a discretion in the Court or a Judge by the present Rule is a decided improvement.

ORDER LVIII.

APPEALS.

Rule 1.

Bills of exceptions and proceedings in error shall be abolished.

This Rule is a re-enactment of Rule 49 of the Principal Act.

See the footnote at p. 241.

This Rule is copied *verbatim* from the First Report of the Judicature Commission* :—"All proceedings in error and bills of exceptions," they recommended, "should be abolished."

They set out as follows the arguments against allowing any more bills of exceptions :—"As to bills of exceptions, the rule is that they must be tendered at the time of the trial, and before verdict given, excluding all opportunity for deliberate consideration, and giving occasion to difficulties as to the proper mode of stating the terms or substance and effect of the Judge's ruling; no bill of exceptions being admissible, unless signed by the Judge, and no proof of his ruling, extrinsic to the bill of exceptions itself (*i.e.*, by shorthand note or otherwise), being allowed. The practice has been to transcribe a hasty and imperfect note at the trial, leaving the bill of exceptions itself to be afterwards agreed upon by the parties, or settled by the Judge. In some cases it is found difficult, in others impossible, to come to any agreement or settlement, and whenever any difference arises, it leads to great delay and expense. The cases are so few in which points of law really intended to be raised can be satisfactorily taken by this form of proceeding, that it is of little use. The convenient mode, and that generally adopted, of raising those points, except when the parties agree to have a special case stated, a practice attended with its own inconveniences, is either by reserving them at the trial, which depends on the leave of the Judge and the consent of the parties, or by motion for a new trial. The power of appeal, when the latter mode is adopted, if the Court gives a unanimous judgment, is not of right, but depends on the will and discretion of the Court."

With regard to the "inconveniences" of "proceedings in error," the Judicature Commissioners remark,† that "error cannot be brought from an interlocutory judgment, *e.g.*, a judgment allowing a demurrer, before the final determination of all issues of law and of fact joined upon the record. The point of law decided on the demurrer may be sufficient, if the judgment stands, to determine the whole controversy between the parties, yet if, as is commonly the case, issues of fact as well as of law have been joined in the pleadings, it is necessary to go through the expense and delay of trying all those issues (though according to the judgment in the demurrer they are wholly immaterial) to get into the Court of Error."

The present Rule sweeps away, of course, the minute details of the Common Law Procedure Acts respecting procedure in error and on appeals.‡

It must not be supposed that the Common Lawyers in the House of Commons submitted, without a murmur, to the abolition of bills of exceptions and proceedings in error. Mr. Lopes, Q.C., gave notice of his

* P. 24. † First Report, p. 22.

‡ See the Act of 1852, ss. 146-167, and the Act of 1854, ss. 34-43.

intention to move the omission of this Rule in Committee, and Mr. Morgan Lloyd, Q.C., gave the following notices:—

“Schedule, page 91, Order 58, sub-section 1, line 32, leave out ‘bills of exceptions and.’

“Schedule, page 91, Order 58, sub-section 1, line 33, after ‘abolished,’ add ‘Provided, that nothing in this or the Principal Act contained shall deprive any party to an action of the right to tender a bill of exceptions to any ruling of a Judge which he would have had if the said Acts had not been passed,’”

“Add sub-section 1 a, as follows:—

“‘Proceedings upon bills of exceptions shall be heard by the said Court of Appeal, and the provisions contained in these Rules shall apply to regulate such proceedings, so far as they are applicable.’”

These notices, however, were not acted upon.*

Rule 2.

All appeals to the Court of Appeal shall be by way of re-hearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part.

This Rule is a re-enactment of Rule 50 of the Principal Act.

The first clause of this Rule is copied *verbatim* from the First Report of the Judicature Commissioners,† who advised that “every appeal should be deemed to be in the nature of a re-hearing; should be brought by notice of motion, in a summary way, without any petition or formal procedure.” Prior to the enactment appeals by way of re-hearing were usually heard on *petition*, and only orders made upon motion were heard upon motion‡ so that this Rule involves a considerable change even in Chancery practice, from which the procedure of this Order is otherwise, for the most part, taken.§

The appeal under the Common Law Procedure Acts, 1854 and 1860, was by way of *case* stated. See s. 39 of the Act of 1854 and s. 9 of the Act of 1860.

Rule 3.

The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary

* Mr. Lopes was obliged to leave town for circuit, and Mr. Morgan Lloyd and he made verbal protests against this Rule.

† First Report, p. 24. ‡ See Daniel’s Chancery Practice, chap. xxxii., s. ii.

§ The Rule clearly repeals Order XXXI., Rule 8, of the Consolidated Orders of that Court.

to serve parties not so affected ; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may seem just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as to the Court of Appeal may seem fit.

This Rule is a re-enactment of Rule 51 of the Principal Act.

At the foot of a petition of appeal in Chancery it was necessary to state the names of the parties intended to be served.*

A petition of appeal in Chancery was not itself served upon the parties, but they might obtain copies of it from the appellant's solicitor or in default, office copies from the Report Office. The order for setting down the petition for hearing was served, but it might be served only two days before the hearing.† A similar interval was all that was necessary in the case of appeal motions.

Rule 4.

Notice of appeal from any judgment, whether final or interlocutory, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice.

This is Rule 1 of the LIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

Only *two days'* notice, as we have seen,‡ was necessary for the hearing of petitions of appeal and appeal motions in Chancery. See the note to Rule 9 as to the length of notice in appeals from the Court of Bankruptcy and the note to Rule 15 as to the length of notice hitherto in appeals from the Court of Admiralty. The latter part of this Rule is taken from s. 37 of the Common Law Procedure Act, 1854.

Rule 5.

The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, together with full discretionary power to receive further evidence upon questions of fact, such

* Chancery Order of 19 March, 1869.

† Daniel's Chancery Practice, pp. 1352 and 1356. ‡ Note to Rule 3.

evidence to be either by oral examination in court,* by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court. The Court of Appeal shall have power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied ; and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may seem just.

This Rule is a re-enactment of Rule 52 of the Principal Act.

"Amendment."—By the Common Law Procedure Act, 1852, s. 222, the proceedings in error, like other proceedings, might have been amended.†

It would seem, also, that the rules with respect to amendment at the hearing of a cause applied to the giving leave to amend at the hearing of an appeal.‡

"Further evidence."—Upon a re-hearing it was not, in general, competent to either party to enter into any new evidence. But an application on motion or petition which had failed below might have been renewed before the Court of Appeal on fresh evidence.§

* 15 and 16 Vict. c. 86, s. 39.

† Archbold's Practice, p. 555.

‡ Daniel's Chancery Practice, p. 1356 ; *President of St. Mary Magdalene v. Sibthorpe*, 1 Russ., 154.

§ *Addison v. Hindmarsh*, 1 Vern., 422. *Re European Bank*, L. R. 5, Ch. 358, 362.

“Matters which occurred after the date of the decision.”—Under the former Chancery practice no evidence was allowed to be given as to matters which had occurred since the original hearing.* This practice is henceforth to be changed.

“Any judgment which ought to have been made.”—This is copied from s. 41 of the Common Law Procedure Act, 1854:—“The Court of Appeal shall give such judgment as ought to have been given in the Court below.” The Common Law Procedure Act, 1852, s. 157, has a similar provision:—“The Courts of Error shall in all cases have power to give such judgment as the Court from which error is brought ought to have given, *without regard to the party alleging error.*”

“The Costs.”—The costs of a rehearing in the Court of Chancery were in the discretion of the Court;† but, generally, if an appeal was dismissed, it was so with costs.‡ Where an appeal was partly successful only, no costs of appeal were usually given; but there was no rule against giving a successful appellant all his costs.§

By s. 42 of the Common Law Procedure Act, 1854, the Court of Appeal had “power to adjudge payment of costs;” and the ordinary practice under that enactment was to adjudge costs of appeal to a successful respondent, but not to a successful appellant.||

The present Rule leaves the costs in the discretion of the Court of Appeal.

Rule 6.

It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied, he shall, within the time specified in the next Rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs.

This Rule is a re-enactment of Rule 53 of the Principal Act.

“Cross Appeal.”—In the Court of Chancery, as between the respon-

* *Lambe v. Orton*, 33 L. J. Ch. 81.

† *Webster v. Cook*, L. R., 2 Ch., 542, 648.

‡ *McCalmont v. Runkin*, 2 De G. M. & G., 403, 426.

§ *Collins v. Burton*, 4 De G. & J., 612, 619.

|| *Barker v. Windle*, 6 E. and B., 675.

dent and the parties *other than* the appellant, only the point appealed from was open to the respondent.* Therefore, where there was an appeal against part of a decree, and the respondent or some other party felt himself aggrieved by another part, not affecting the interest of the appellant, he was obliged to present a cross-appeal. The appeal and the cross-appeal might then be heard at the same time, and one order be made in both.†

The present Rule renders this practice no longer necessary, and makes other provisions to meet such a case when it arises.

Rule 7.

Subject to any special order which may be made, notice by a respondent under the last preceding Rule shall, in the case of any appeal from a final judgment, be an eight days' notice, and, in the case of an appeal from an interlocutory order, a two days' notice.

This is Rule 2 of the LIInd Order of the Rules of Court, drawn up, in 1874, under the Principal Act, "the last preceding Rule" being substituted for "Section 53 of the Schedule," in order to bring the Rule into harmony with the present Act.

"Two days' notice."—See note to Rules 3 and 4 of this Order.

Rule 8.

The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order, or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to be heard according to its order in such list, unless the Court of Appeal or a Judge thereof shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal.

This is Rule 3 of the LIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

"Produce the order."—This is in accordance with the former practice of the Court of Chancery with regard to appeal motions. They were set

* *Lord Broke v. Earl of Warwick*, 13 Jur., 547, L.C.

† *Blackburn v. Jepson*, 2 V. and B., 359.

down by the Order of Course Clerk in the Registrar's Office upon the production of the order appealed from or an office copy of it, and upon filing with him a copy of the notice of motion.*

Rule 9

The time for appealing from any order or decision made or given in the matter of the winding-up of a company under the provisions of the Companies Act, 1862, or any Act amending the same, or any order or decision made in the matter of any bankruptcy, or in any other matter not being an action, shall be the same as the time limited for appeal from an interlocutory order under Rule 15.

This is the 4th Rule of the LIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

By the Reg. Gen. of 1870, made in pursuance of the Bankruptcy Act, 1869, it is provided, that an appeal against a decision or order of the Chief Judge in Bankruptcy shall be entered with the Registrar of Appeals within 21 days from such decision or order, the same period which is limited in all cases of interlocutory appeals by Rule 15, *infra*. By s. 124 of the Companies Act, 1862, "re-hearings of and appeals from any order or decision made or given in the matter of the winding-up of a company may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction. Three weeks' notice of appeal must be given under the same section, unless the time be extended by the Court of Appeal.

Rule 10.

Where an *ex parte* application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as a Judge of the Court below or of the Appeal Court may allow.

This is Rule 5 of the LIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act.

When an order was made by the Lord Chancellor on an *ex parte* application, it was the practice to introduce into the order a provision that the other party should be at liberty to apply to the Judge to whose Court the cause was attached to vary or discharge it.†

* Reg. Regul., 15th March, 1860, Rules 1 & 11.

† *George v. Whatworth*, 4 L. J., Ch., N. S., 61, 62. See *Lindsay v. Tyrrell*, 2 De G. & L. J., 7.

Rule 11.

When any question of fact is involved in an appeal, the evidence taken in the Court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows :

(a.) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed.

(b.) As to any evidence given orally, by the production of a copy of the Judge's notes, or such other materials as the Court may deem expedient.

This Rule is substituted for Rule 54 of the Principal Act, the words "in such manner as may be directed" being omitted after the words "Court of Appeal," and the two sub-sections (a) and (b) added.

The Rule in its present form is copied from Rule 6 of the LIInd Order of the Rules of Court, drawn up, in 1874, under the Principal Act. Sub-section (a) of this Rule is explained by the Order of the Court of Chancery of the 16th May, 1862, by which it is provided, that all affidavits on the hearing of any cause on which issue shall have been joined, or on a notice of motion for a decree, shall be *printed*, except affidavits filed for the purpose of any interlocutory application, of which *office copies* shall have been taken for that purpose.

Order XXXVIII, Rule 4 also of the present Schedule provides that where evidence in any action is taken by affidavit it shall be printed. (See also the Additional Rules, Order 3.)

Sub-section (b) of this Rule is in accordance with the practice of the Court of Chancery ; the Chancery Order of the 5th February, 1861, Rule 14, providing that "upon any appeal or rehearing by way of appeal the Judge's notes of the *vivâ voce* evidence shall, *primâ facie*, be deemed to be a sufficient note thereof."

Rule 12.

Where evidence has not been printed in the Court below, the Court below or a Judge thereof, or the Court of Appeal or a Judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof unless the Court of Appeal, or a Judge thereof, shall otherwise order.

This is Rule 7 of the LIInd Order of the Rules of Court, drawn up, in 1874, under the Principal Act. (See Orders I and II of the Additional Rules of Court of the 12th August, 1865.)

The last clause of this Rule places a most salutary check on the system of indiscriminate printing, which makes appeals so expensive to the suitor. (It is to be hoped that a check will be placed on printing in appeals to the House of Lords).

Rule 13.

If, upon the hearing of an appeal, a question arise as to the ruling or direction of the Judge to a Jury or assessors, the Court shall have regard to verified notes or other evidence, and to such other materials as the Court may deem expedient.

This Rule is a re-enactment of Rule 55 of the Principal Act.

"Upon appeals proof of a Judge's ruling by a *shorthand writer's notes*, ought, in our opinion, to be received." First report of the Judicature Commission, p. 24. (See Rule 11 (b).)

Rule 14.

No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may seem just.

This Rule is a re-enactment of Rule 56 of the Principal Act.

This Rule is copied almost *verbatim* from the First Report of the Judicature Commission,* who recommended that "no interlocutory order from which there has been no appeal, should operate so as to bar or prejudice a decision upon the merits."

Rule 15.

No appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. The said respective periods shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of

* P. 24.

the refusal of an application, from the date of such refusal. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal.

This Rule is a re-enactment of Rule 57 of the Judicature Act, the words, "or from such time as may be prescribed by Rules of Court," being omitted, as inapplicable to the present Act.

The periods fixed by this Rule are, generally speaking, very much shorter than those previously sanctioned by the Legislature in each of the Courts.

"For appeals and rehearings in Chancery," observe the Judicature Commissioners, "a period of *five years** from the date of the decree or order appealed from is allowed, after which the leave of the Lord Chancellor or Lords Justices is necessary, and such leave may be given at any time, but will only be given if it shall appear, under the peculiar circumstances of the case, to be just and expedient.

"At Common Law *six years*† after the date of final judgment are allowed for bringing error to the Exchequer Chamber. In cases of appeal as distinguished from error, in the Common Law Courts, notice of appeal must be given *within four days*‡ after the decision appealed from, unless the time is enlarged.§ When such notice is given, which for want of opportunity of full consideration it generally is, *no time* is limited within which the party must proceed to prosecute his appeal.

"In the Probate Court || application for leave to appeal from an interlocutory decree or order must be made *within a month* after the delivery of the decree or order, or within such enlarged time as the Court may direct, and it may be doubted whether any time is limited for appealing from decrees or orders.

"Appeals from the Court of Admiralty must be founded either on notice given to the registrar *immediately* after the delivery of the judgment, or upon a declaration, called a 'Protocol of Appeal,' and made before a notary and witnesses *within 15 days*, and must be prosecuted by presenting a petition of appeal to your Majesty in Council *within 1 year*¶ from the date of the sentence or decree appealed from."

Having given this statistical review of the question,** the Judicature Commission proceed to recommend†† that "the time for appealing from interlocutory orders made in the progress of a suit, before the final decision upon the merits between the parties, ought to be regulated by general orders. In all other cases a fixed period, *not exceeding 6 months*

* Order XXXI., Rule 1, of the Consolidated Orders of the Court of Chancery.

† Common Law Procedure Act, 1852, s. 146.

‡ Common Law Procedure Act, 1854, s. 37.

§ *Loveland v. Lumley*, 5 H. and N. 656.

|| Rules of the Court of Probate, Rule 57.

¶ A year and a day. Williams and Bruce's Admiralty Practice, p. 314.

** First Report, pp. 22, 23.

†† *Ib.* p. 24.

from the time when any judgment, decree, rule, or order is made or entered upon the record, should be allowed for appealing against it."

It will be seen that the framers of this Rule have followed an independent course. They have adopted, as to the time within which an appeal must be brought from an interlocutory order, the rule laid down as to appeals from the Chief Judge in Bankruptcy (see note to Rule 9 of this Order)*—and they have adopted, as to the time within which an appeal must be brought in other cases, the practice of the Court of Admiralty.

"Security for costs." The former practice with regard to giving security for costs is thus stated by the Judicature Commissioners:—†

"In the Court of Chancery no security for the costs of appeal is required beyond a deposit of £20‡ with the Registrar, when the petition is for rehearing of a decree or decretal order. Upon interlocutory appeals no deposit is made. In the Courts of Common Law every appellant (in an appeal, technically so called), and every defendant in an action who brings error is required to give substantial bail to pay costs; but a plaintiff who is a plaintiff in error gives no security. In the Courts of Probate and Divorce no security for costs is taken. Appellants from the Court of Admiralty, if resident out of the jurisdiction of the Court, may be required to give bail in £300; if within the jurisdiction, they give no security."

The Judicature Commissioners then recommend that "the right of appeal should, as a general rule, be *conditional on substantial security being given by the appellant for the costs of the appeal*. Inasmuch, however, as there may be cases to which this rule could not be applied without inconvenience or injustice, both *the nature and the amount* of such security, and the regulations according to which it may be required or dispensed with, are subjects which may properly be dealt with by General Orders of the Court."

It will be seen that this recommendation is dealt with in the last clause of the present Rule.

Rule 16.

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any Judge thereof, or the Court of Appeal, may so order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct.

This Rule is a re-enactment of Rule 58 of the Principal Act.

On the subject-matter of this Rule the Judicature Commissioners observe:—"In the Court of Chancery and the Probate Court an appeal

* In the Court of Probate no appeal from an interlocutory order can be lodged without leave of the Court of Probate: 20 and 21 Vict., c. 77, s. 39. † First Report, p. 23.

‡ Order XXXI., Rule 4, of the Consolidated Orders of the Court of Chancery. § First Report, pp. 23, 24.

does not operate as a stay of execution, unless the Court, upon special application, so directs.* In the Courts of Common Law appeal or error operates always as a stay of execution, as soon as security is given.† In the Court of Admiralty an appeal is followed, of course, by an inhibition, which has the same effect."‡ The Commissioners then recommend, that "no appeal shall operate as a stay of execution or of proceedings under the order appealed from, unless the Court or a Judge of the Court from which the appeal is brought, or the Court of Appeal, shall so order. But such stay of execution should be granted, as, of course, when the order under appeal is for a money payment, on the terms of payment of the money into Court, or of security being given to the satisfaction of the Court."

It will be seen that the first sentence of the present Rule is copied *verbatim* from the recommendation of the Judicature Commissioners.

Rule 17.

Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal, or to a Judge of the Court below or of the Court of Appeal, it shall be made in the first instance to the Court or Judge below.

This is Rule 8 of the LIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act. See s. 50 of the Principal Act, the previous Rule, and Order LX., Rule 6, *infra*.

Rule 18.

Every application to a Judge of the Court of Appeal shall be by motion, and the provisions of Order LIII. shall apply thereto.

This is Rule 9 of the LIInd Order of the Rules of Court, drawn up in 1874, under the Principal Act. (See p. 506.)

ORDER LIX.

EFFECT OF NON-COMPLIANCE.

Non-compliance with any of these Rules shall not render the proceedings in any action void unless the Court or a Judge shall so direct; but such proceedings may be set aside either wholly or in part as irregular, or amended,

* Order XXXI., Rule 2, of the Consolidated Orders of the Court of Chancery.

† Common Law Procedure Act, 1854, s. 38; Common Law Procedure Act, 1860, s. 18.

‡ Rules for Admiralty Appeals, Rule 4.

or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit.

This is Order LIII. of the Rules of Court, drawn up, in 1874, under the Principal Act.

This Rule embodies an important saving principle often acted upon by the Court of Chancery. Thus, an order which is not in compliance with the Chancery Orders cannot be treated as a nullity: it must be properly discharged.*

By Order III, Rule 5, of the Consolidated Orders of the Court of Chancery, a party suing in person must endorse his name and residence and address for service upon every writ which he shall sue out. Where a plaintiff neglected to indorse his address for service on a writ of *subpoena* under the old Chancery practice, from the decision in the case of *Price v. Webb*, 2 Hare 511, 513, it would appear that the writ was not void, but that the Court would so deal with the proceedings by staying process or otherwise, as to give the defendant the benefit of the Rule.†

Very full powers of amendment of the pleadings are given by Order XXVII. of this Schedule.

Irregularity is generally visited, both at law and in equity, with costs.

ORDER LX.‡

OFFICERS.

Rule 1.

All officers, who, at the time of the commencement of the said Act, shall be attached to the Court of Chancery, shall be attached to the Chancery Division of the said High Court; and all officers, who, at the time of the commencement of the said Act, shall be attached to the Court of Queen's Bench, shall be attached to the Queen's Bench Division of the said High Court; and all officers, who, at the time of the commencement of the said Act, shall be attached to the Court of Common Pleas, shall be attached to the Common Pleas Division of the said High Court; and all officers, who, at the time of the commencement of the said Act, shall be attached to the Court of Exchequer, shall be attached to the Exchequer Division of the said

* *Wilkins v. Stevens*, 10 Sim. 617; *Blake v. Blake*, 7 Beav., 514; *Flemings v. Humphery*, 4 Beav. 1.

† *Morgan and Chute's Chancery Acts and Orders*, pp. 388, 395.

‡ See, as to the subject-matter of present Order, ss. 77 and 84 of the Principal Act.

High Court; and all officers, who, at the time of the commencement of the said Act, shall be attached to the Court of Probate, the Court of Divorce, and the Court of Admiralty respectively, shall be attached to the Probate, Divorce, and Admiralty Division of the said High Court.

This is Rule 1 of the LIVth Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

The words "and the London Court of Bankruptcy" were struck out in Committee, after "Court of Exchequer," by the Attorney-General.

This is one of the transition Rules of this Schedule.

Rule 2.

Officers attached to any Division shall follow the appeals from the same Division, and shall perform in the Court of Appeal analogous duties in reference to such appeals as the Registrars and officers of the Court of Chancery usually performed as to re-hearings in the Court of Appeal in Chancery, and as the Masters and officers of the Courts of Queen's Bench, Common Pleas, and Exchequer respectively performed as to appeals heard by the Court of Exchequer Chamber.

This is Rule 2 of the LIVth Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

This is one of the transition Rules of this Schedule.

For examples of the duties performed by Registrars on rehearings, see Order XXXI., Rules 4 and 5 of the Consolidated Orders of the Court of Chancery; by the Masters in proceedings in error, the Common Law Procedure Act, 1852, ss. 149, 158.

ORDER LXI.*

SITTINGS AND VACATIONS.

The sittings of the Court of Appeal and the sittings in London and Middlesex of the High Court of Justice shall be four in every year, viz., the Michaelmas sittings, the Hilary sittings, the Easter sittings, and the Trinity sittings.

* This Order should be read in connection with ss. 26-30 of the Principal Act. See pp. 68—75.

The Michaelmas sittings shall commence on the 2nd of November and terminate on the 21st of December; the Hilary sittings shall commence on the 11th of January and terminate on the Wednesday before Easter; the Easter sittings shall commence on the Tuesday after Easter week and terminate on the Friday before Whitsunday. The Trinity sittings shall commence on the Tuesday after Whitsun week and terminate on the 8th of August.

This is Rule 1 of the LVth Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

It will be observed that the Michaelmas "sittings" commence on the same day as the former Michaelmas "term," and the Hilary "sittings" on the same day as the former Hilary "term."

It will be also noticed that the "sittings" extend in length far beyond the former "terms," and include the periods usually appropriated to the Assizes.

Rule 2.

The vacations to be observed in the several Courts and offices of the Supreme Court shall be four in every year, viz., the Long Vacation, the Christmas Vacation, the Easter Vacation, and the Whitsun Vacation.

The Long Vacation shall commence on the 10th of August and terminate on the 24th of October. The Christmas Vacation shall commence on the 24th of December and terminate on the 6th of January. The Easter Vacation shall commence on Good Friday and terminate on Easter Tuesday; and the Whitsun Vacation shall commence on the Saturday before Whitsunday and shall terminate on the Tuesday after Whitsunday.

This is Rule 2 of the LVth Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

This Rule is partly taken from Rule 4 of Order V. of the Consolidated Orders of the Court of Chancery.

The alterations are as follows:—The Long Vacation is to end on the 24th of October instead of the 28th. The 24th of October is the recognized day for the termination of the Long Vacation at Common Law. By the 2 Wm. IV., c. 39, s. 11, "No declaration or pleading after declaration

shall be filed or delivered between the 10th of August and the 24th of October.”*

The Easter Vacation is to commence on Good Friday and end on Easter Tuesday, instead of “the days” being left to the Lord Chancellor “every year specially to direct.” The Whitsun Vacation is defined, in the new phraseology, to commence on “the Saturday before Whitsunday,” instead of “the third day after Easter term,” and to terminate on “the Tuesday after Whitsunday” instead of “the second day before Trinity term.”

Although not expressly made in pursuance of s. 27 of the Principal Act, this Rule practically carries out the objects which the framers of that section had in view. (See pp. 69, 70.)

Rule 3.

The days of the commencement and termination of each sitting and vacation shall be included in such sitting and vacation respectively.

This is Rule 3 of the LVth Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

This Rule is copied *verbatim* from subsection (5) of the 4th Rule of the Vth Order of the Consolidated Orders of the Court of Chancery.

Rule 4.

The several offices of the Supreme Court shall be open on every day of the year, except Sundays, Good Friday, Monday and Tuesday in Easter week, Whit Monday, Christmas Day, and the next following working day, and all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving.

This is Rule 4 of the LVth Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

This Rule is copied *verbatim* from Rule 1 of the Vth Order of the Consolidated Orders of the Court of Chancery, with the addition of the words “and the next following working day” after “Christmas day.” This appears to be a concession to the somewhat more liberal arrangements for holidays at the Masters’ Offices. Reg. Gen. Hil. T., 1853, Rule 173, following 3 and 4 Wm. IV. c. 42, s. 43, provides, that the Masters’ Offices shall be closed on “Christmas Day and the *three* following days.” The Masters’ Offices were also closed on Easter Eve, and on Whit Tuesday (if it did not fall in term time).†

* See also Reg. Gen. Hil. T., 1853, Rule 173.

† Reg. Gen. Hil. T., 6 Wm. IV., and Reg. Gen. Hil. T., 1853, Rule 73.

Rule 5.

Two of the Judges of the High Court shall be selected at the commencement of each Long Vacation for the hearing in London or Middlesex during vacation of all such applications as may require to be immediately or promptly heard; such two Judges shall act as Vacation Judges for one year from their appointment. In the absence of arrangement between the Judges, the two Vacation Judges shall be the two Judges last appointed (whether as Judges of the said High Court or of any Court whose jurisdiction is by the said Act transferred to the said High Court) who have not already served as Vacation Judges of any such Court; and if there shall not be two Judges for the time being of the said High Court who shall not have so served, then the two vacation Judges shall be the Judge (if any) who has not so served, and the senior Judge or Judges who has or have so served once only, according to seniority of appointment, whether in the said High Court or such other Court as aforesaid. The Lord Chancellor shall not be liable to serve as a Vacation Judge.

This is Rule 5 of the LVth Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

This Rule and the next are the "provisions made" for carrying out Section 28 of the Principal Act. (Which see at p. 71.)

These Rules are founded on the previous practice of the Master of the Rolls and the Vice-Chancellors, who, by an excellent arrangement amongst themselves, took duty each for one year, according to a recognized *rota*, as "Vacation Judge."* The duties of "Vacation Judge" commenced immediately on the rising of the Courts for the Long Vacation,† although they might have risen before the time fixed for the commencement of the vacation. Contrary to the usual practice at other times the "Vacation Judge" was expressly empowered to transact business belonging to another Judge.‡ A similar *rota* existed at Common Law.

* See Daniel's Chancery Practice, pp. 849 and 1067.

† *Francis v. Browne*, 8 Jur. N.S. 785; *Re Bank of Hindustan*, 16 L.T. N.S. 760; *Allen v. Hicks*, W.N. (1870), 218.

‡ Order VI., Rule 11, and Order XXXV., Rule 59, of the Consolidated Orders of the Court of Chancery.

The present Rule provides for *two* Vacation Judges, instead of one. It may be assumed that the Chancery Division will supply one of these Vacation Judges, and the Common Law Divisions the other.

It was not the practice of the Lord Chancellor or the Lords Justices to serve as Vacation Judges.

Rule 6.

The Vacation Judges may sit either separately or together as a Divisional Court, as occasion shall require, and may hear and dispose of all actions, matters, and other business to whichever Division the same may be assigned. No order made by a Vacation Judge shall be reversed or varied except by a Divisional Court or the Court of Appeal, or a Judge thereof, or the Judge who made the order. Any other Judge of the High Court may sit in vacation for any Vacation Judge.

This is Rule 6 of the LVth Order of the Rules of Court, drawn up in 1874, under the Principal Act.

This Rule, of course, is new. It provides, so to speak, a *new* Divisional Court for the convenience of suitors. (See Order LVIII., Rule 17.)

Two Rules, which followed this one, were struck out in Committee on the motion of the Attorney-General. They provided for one of the Ordinary Judges of the Court of Appeal, sitting as a Vacation Judge, in addition to the two Vacation Judges selected from the Judges of the High Court of Justice. The omission of these Rules was necessitated by the reduction in the number of "Ordinary" Judges of the Court of Appeal from 7* to 3.†

Rule 7.

The Vacation Judges of the High Court may dispose of all actions, matters, and other business of an urgent nature during any interval between the sittings of any Division of the High Court to which such business may be assigned, although such interval may not be called or known as a "vacation."

* See section 6 of the Principal Act.

† See section 4 of this Act.

This is Rule 9 of the LVth Order of the Rules of Court, drawn up, in 1874, under the Principal Act.

This is in accordance with the previous practice of the Court of Chancery, as stated in the note to Rule 5 of this Order, *supra*.

ORDER LXII.

EXCEPTIONS FROM THE RULES.

Nothing in these Rules shall affect the Practice or Procedure in any of the following causes or matters :—

Criminal proceedings :

Proceedings on the Crown side of the Queen's Bench Division :

Proceedings on the Revenue side of the Exchequer Division :

Proceedings for Divorce or other Matrimonial causes.

This is Order LVI of the Rules of Court, drawn up, in 1874, under the Principal Act.

The exceptions, it is to be noted, are only exceptions from the Rules of the present *Schedule*, not from the rest of the Supreme Court of Judicature Acts, 1873 and 1875.

"Criminal proceedings." By s. 19 of this Act the Practice and Procedure in criminal causes are to remain the same as before the commencement of the Act, "subject to the first Schedule and any Rules of Court to be made under this Act." It will be seen that as far as this Schedule is concerned, the proviso is surplusage.

By s. 34 of the Principal Act criminal matters which would have been within the exclusive jurisdiction of the Court of Queen's Bench in the exercise of its *original* jurisdiction, if this Act had not passed, are assigned to it. See the note to s. 45 of the Principal Act at p. 105.

Sections 92 and 93 of the Principal Act contain enactments relating to the "Revenue side of the Court of Exchequer."

By s. 18 of this Act it is provided, that the Rules and Orders of Court in force at the time of the commencement of this Act in the Court for Divorce and Matrimonial Causes shall remain in force, except so far as they are expressly varied by the first Schedule or by Rules of Court made before the commencement of the Act. As far as the first Schedule is concerned, the exception is surplusage.

ORDER LXIII.

INTERPRETATION OF TERMS.

The provisions of the 100th section of the Act shall apply to these Rules.

In the construction of these Rules, unless there is any-

thing in the subject or context repugnant thereto, the several words hereinafter mentioned or referred to shall have or include the meanings following :

“ Person ” shall include a body corporate or politic.

“ Probate actions ” shall include actions and other matters relating to the grant or recall of probate or of letters of administration other than common form business.

“ Proper officer ” shall, unless and until any Rule to the contrary is made, mean an officer to be ascertained as follows :—

(a.) Where any duty to be discharged under the Act or these rules is a duty which has heretofore been discharged by any officer, such officer shall continue to be the proper officer to discharge the same.

(b.) Where any new duty is under the Act or these rules to be discharged, the proper officer to discharge the same shall be such officer, having previously discharged analogous duties, as may from time to time be directed to discharge the same in the case of an officer of the Supreme Court, or the High Court of Justice, or the Court of Appeal, not attached to any Division, by the Lord Chancellor, and in the case of an officer attached to any Division by the President of the Division, and in the case of an officer attached to any Judge, by such Judge.

“ THE ACT ” and “ THE SAID ACT,” shall respectively mean THE SUPREME COURT OF JUDICATURE ACT, 1873, AS AMENDED BY THIS ACT.

This is Order LVII of the Rules of Court, drawn up, in 1874, under the Principal Act.

As to the “ proper officer,” see pp. 293, 294, 296, 299, 301, 316, 404, 444, 462, 464, 487, &c.

the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any].

Indorsement to be made on the writ after service thereof.

This writ was served by X.Y. on L.M. [the defendant *or* one of the defendants], on Monday, the _____ day of _____, 18 ____.

(signed) X.Y.

This is Form No. 1 of Part I. of Schedule (A) to the Rules of Court drawn up in 1874, under the Judicature Acts. This form illustrates Order II., Rule 3, of the present Act, p. 278, *supra*. See as to the *Teste*, p. 480. As to the plaintiff's address, see p. 290. As to renewal, see p. 302.

No. 2.

Writ for service out of the jurisdiction, or where notice in lieu of service is to be given out of the jurisdiction.

187 . [*Here put the letter and number.*]

In the High Court of Justice.
Division.

Between A.B. Plaintiff,
and
C.D. and E.F. Defendants.

VICTORIA, by the grace of God, &c.

To *C.D.*, of

We command you, *C.D.*, That within [*here insert the number of days*
DIRECTED BY THE COURT OR JUDGE *ordering the service or notice*] after the
service of this writ [*or notice of this writ as the case may be*] on you,
inclusive of the day of such service, you do cause an appearance to be
entered for you in the Division of Our High Court of
Justice in an action at the suit of *A.B.*; and take notice, that in default
of your so doing, the plaintiff may, BY LEAVE of the Court or a Judge,
PROCEED therein, and judgment may be given in your absence. Witness,
&c.

Memoranda and Indorsements as in Form No. 1.

Indorsement to be made on the writ before the issue thereof.

N.B.—This writ is to be used where the Defendant or all the Defendants or one or more Defendant or Defendants is or are out of the jurisdiction.

This is Form No. 2 of Part I. of Schedule (A) of the Rules of Court drawn up in 1874 under the Principal Act. This form illustrates Order II, Rule 5 of the present Act, p. 279, *supra*. As to leave to serve this Writ, see pp. 279, 312. As to directing time of appearance, see p. 314. As to leave to proceed, see p. 325.

No. 3.

Notice of Writ in lieu of service to be given out of the jurisdiction.

187 . [Here put the letter and number.]

Between *A.B.* Plaintiff,

and

C.D., E.F., and G.H. Defendants.

To *G.H.*, of

Take notice, that *A.B.*, of _____ has commenced an action against you, *G.H.*, in the _____ Division of Her Majesty's High Court of Justice in England, by writ of that Court, dated the _____ day of _____, A.D. 18 ____; which writ is endorsed as follows [*copy in full the indorsements*], and you are required within _____ days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said Court to the said action; and in default of your so doing, the said *A.B.* may, BY LEAVE of the Court or a Judge, proceed therein, and judgment may be given in your absence.

You may appear to the said writ by entering an appearance personally or by your solicitor at the [_____] office at

(signed) *A.B.* of _____ &c.

or

X.Y. of _____ &c.

Solicitor for *A.B.*

In the High Court of Justice.

Division.

This is Form No. 3 of Part I of Schedule (A) to the Rules of Court drawn up in 1874 under the Principal Act.

This notice illustrates Order II, Rule 5 of the present Act, p. 279, *supra*. As to leave to proceed, see p. 325.

No. 4.

Writ in Admiralty action in rem.

187 . [Here put the letter and number.]

In the High Court of Justice.

Admiralty Division.

Between *A.B.*, plaintiff

and

OWNERS.

VICTORIA, &c.

TO THE OWNERS AND PARTIES INTERESTED in the ship or vessel [*Mary*] [or cargo, &c., as the case may be] of the port of

We hereby authorise _____ officer of Our Supreme Court, and all and singular his substitutes, to arrest the ship or vessel [*Mary*], of the

port of and the cargo laden therein [*or cargo, &c., as the case may be*], and to keep the same under safe arrest until he shall receive further orders from Us. And We command YOU, THE OWNERS AND OTHER PARTIES INTERESTED in the said ship and cargo [*or cargo, &c., as the case may be*] that within EIGHT days after the arrest of the said vessel [*or cargo, &c., as the case may be*] you do cause an appearance to be entered for you in the Admiralty Division of Our High Court of Justice in an action at the suit of *A.B.*; and take notice that, in default of your so doing, Our said Court will proceed to hear the said action and to pronounce judgment therein, your absence notwithstanding.

This is Form No. 4 of Part I of Schedule (A) to the Rules of Court drawn up in 1874 under the Principal Act.

This form illustrates Order II, Rule 7 of the present Act, p. 283, *supra*. See the note to that Order, p. 283, and also Part II, s. 6.

No. 5.

Form of Memorandum for Renewed Writ.

In the High Court of Justice.

Division.

Between *A.B.*, plaintiff,

and

C.D., defendant.

Seal renewed writ of summons in this action indorsed as follows:—

[*Copy original writ and the indorsements.*]

This is Form No. 5 of Part I of Schedule (A) to the Rules of Court drawn up in 1874 under the Principal Act.

This form illustrates Order VIII, Rule 1 of the present Act, p. 301, *supra*.

No. 6.

Memorandum of Appearance.

187 . [*Here put the letter and number.*]

High Court of Justice.

[*Chancery*] Division.

A.B., v. *C.D.*, and others.

ENTER an appearance for
in this action.

Dated this day of

X.Y.,

Solicitor for the defendant.

The place of business of *X.Y.* is

His ADDRESS FOR SERVICE is

or [*C.D.*,
Defendant in person.

The address of *C.D.* is

His address for service is .]

The said DEFENDANT [REQUIRES, or, DOES NOT REQUIRE] A STATEMENT OF COMPLAINT to be filed and delivered.

This is Form No. 6 of Part I of Schedule (A) to the Rules of Court drawn up in 1874 under the Principal Act.

This form illustrates Order XII, Rules 6 to 10 of the present Act, pp. 316-318, *supra*. As to the requirements of a statement of complaint, see pp. 355, 374 and 377.

No. 7.

[*Here put the letter and number.*]

In the High Court of Justice.

Queen's Bench (or Chancery, C. P., or, &c.) Division.

Between *A.B.*, plaintiff,

and

C.D., and

E.F., defendants.

The defendant, *C.D.*, limits his defence to part only of the property mentioned in the writ in this action, that is to say, to the close called "the Big Field."

Yours, &c.,

G.H.,

Solicitor for the said defendant, *C.D.*

To Mr. *X.Y.*, plaintiff's solicitor.

This is Form No. 7 of Part I of Schedule (A) to the Rules of Court drawn up in 1874 under the Principal Act.

This Form illustrates Order XII, Rules 21 and 22 of the present Act, pp. 322-3, *supra*.

PART II.

See Order III, Rule 3, p. 285.

SECTION I.

GENERAL INDORSEMENTS.

In Matters assigned by the 34th Section of the Act to the Chancery Division, (p. 83).

The 34th Section of the Principal Act assigns to the Chancery Division of the High Court all causes and matters pending in the Court of Chancery at the commencement of the Act; all

causes and matters to be commenced after the commencement of the Act under any Act of Parliament by which exclusive jurisdiction in respect to such causes or matters has been given to the Court of Chancery or to any Judges or Judge thereof respectively, except Appeals from County Courts; all causes and matters for any of the following purposes: the administration of the estates of deceased persons; the dissolution of partnerships, or the taking of partnership or other accounts; the redemption or foreclosure of mortgages, the raising of portions or other charges on land; the sale and distribution of the proceeds of property subject to any lien or charge; the execution of trusts, charitable or private; the rectification or setting aside or cancellation of deeds and other written instruments; the specific performance of contracts between vendors and purchasers of real estates including contracts for leases; the partition or sale of real estates; the wardship of infants and the care of infants' estates. It will be perceived that the forms of indorsements are not intended to be an exhaustive list, but merely specimens, several of the items of the above list of subjects receiving no illustration whatever from these forms.

1. *Creditor to administer Estate.*

The plaintiff's claim is as a creditor of *X.Y.*, of _____ deceased, to have the [real and] personal estate of the said *X.Y.* administered. The defendant *C.D.*, is sued as the administrator of the said *X.Y.* [and the defendants *E.F.* and *G.H.* as his co-heirs-at-law].

2. *Legatee to administer Estate.*

The plaintiff's claim is as a legatee under the will dated the _____ day of _____ 18____, of *X.Y.* deceased, to have the [real and] personal estate of the said *X.Y.* administered. The defendant *C.D.* is sued as the executor of the said *X.Y.* [and the defendants *E.F.* and *G.H.* as his devisees].

3. *Partnership.*

The plaintiff's claim is to have an account taken of the partnership dealings between the plaintiff and defendant [under articles of partnership dated the _____ day of _____], and to have the affairs of the partnership wound up.

4. *By Mortgagee.*

The plaintiff's claim is to have an account taken of what is due to him for principal, interest, and costs on a mortgage dated the _____ day of _____

, made between [or by deposit of title deeds], and that the mortgage may be enforced by foreclosure or sale.

5. *By Mortgagor.*

The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage dated and made between [parties], and to redeem the property comprised therein.

6. *Raising Portions.*

The plaintiff's claim is that a sum of £, which by an indenture of settlement dated , was provided for the portions of the younger children of may be raised.

7. *Execution of Trusts.*

The plaintiff's claim is to have the trusts of an indenture dated , and made between , carried into execution.

8. *Cancellation or Rectification.*

The plaintiff's claim is to have a deed dated , and made between [parties], set aside or rectified.

9. *Specific Performance.*

The plaintiff's claim is for specific performance of an agreement dated the day of , for the sale by the plaintiff to the defendant of certain [freehold] hereditaments at

This is Section I of part 2 of Schedule (A) to the Rules of Court drawn up in 1874 under the Principal Act.

SECTION II.

Money Claims where no Special Indorsement under Order III, Rule 6, (p. 278.)

“Order III. Rule 6,” is substituted for “Rule 7 in Schedule to Act,” in order to adapt the forms to the present Act.

Goods sold.	The plaintiff's claim is £. for the price of goods sold. [This form shall suffice whether the claim be in respect of goods sold and delivered, or of goods bargained and sold.]
Money lent.	The plaintiff's claim is £. for money lent [and interest].
Several demands.	The plaintiff's claim is £., whereof £. is for the price of goods sold, and £. for money lent, and £. for interest.
Rent.	The plaintiff's claim is £. for arrears of rent.
Salary, &c.	The plaintiff's claim is £. for arrears of salary as a clerk [or as the case may be].
Interest.	The plaintiff's claim is £. for interest upon money lent.
General average.	The plaintiff's claim is £. for a general average contribution.

The plaintiff's claim is	l. for freight and demurrage.	Freight, &c.
The plaintiff's claim is	l. for lighterage.	
The plaintiff's claim is	l. for market tolls and stallage.	Tolls.
The plaintiff's claim is	l. for penalties under the statute	Penalties.
[. . .]		
The plaintiff's claim is defendant as a banker.	l. for money deposited with the	Banker's balance.
The plaintiff's claim is money expended] as a solicitor.	l. for fees for work done [and l.,	Fees, &c., as solicitors.
The plaintiff's claim is character, as auctioneer, cotton broker, &c.]	l. for commission earned as [state	Commission.
The plaintiff's claim is	l. for medical attendances.	Medical attendance, &c.
The plaintiff's claim is upon policies of insurance.	l. for a return of premiums paid	Return of premium.
The plaintiff's claim is	l. for the warehousing of goods.	Warehouse rent.
The plaintiff's claim is railway.	l. for the carriage of goods by	Carriage of goods.
The plaintiff's claim is house.	l. for the use and occupation of a	Use and occupation of houses.
The plaintiff's claim is	l. for the hire of [furniture].	Hire of goods.
The plaintiff's claim is	l. for work done as a surveyor.	Work done.
The plaintiff's claim is	l. for board and lodging.	Board and lodging.
The plaintiff's claim is tuition of X. Y.	l. for the board, lodging, and	Schooling.
The plaintiff's claim is defendant as solicitor [or factor, or collector, or, &c.] of the plaintiff.	l. for money received by the de-	Money received.
The plaintiff's claim is dant under colour of the office of	l. for fees received by the defen-	Fees of office.
The plaintiff's claim is charged for the carriage of goods by railway.	l. for a return of money over-	Money overpaid.
The plaintiff's claim is by the defendant as	l. for a return of fees overcharged	
The plaintiff's claim is with the defendant as stakeholder.	l. for a return of money deposited	Return of money by stakeholder
The plaintiff's claim is defendant as stakeholder, and become payable to plaintiff.	l. for money intrusted to the	Money won from stakeholder.
The plaintiff's claim is to the defendant as agent of the plaintiff.	l. for a return of money intrusted	Money intrusted to agent.
The plaintiff's claim is from the plaintiff by fraud.	l. for a return of money obtained	Money obtained by fraud.
The plaintiff's claim is he defendant by mistake.	l. for a return of money paid to	Money paid by mistake.

Money paid for consideration which has failed.	The plaintiff's claim is	1. for a return of money paid to the defendant for [<i>work to be done, left undone; or, a bill to be taken up, not taken up; or, &c.</i>]
	The plaintiff's claim is	1. for a return of money paid as a deposit upon shares to be allotted.
Money paid by surety for defendant.	The plaintiff's claim is	1. for money paid for the defendant as his surety.
Rent paid.	The plaintiff's claim is	1. for money paid for rent due by the defendant.
Money paid on accommodation bill.	The plaintiff's claim is	1. upon a bill of exchange accepted [<i>or indorsed</i>] for the defendant's accommodation.
Contribution by surety.	The plaintiff's claim is	1. for a contribution in respect of money paid by the plaintiff as surety.
By co-debtor.	The plaintiff's claim is	1. for a contribution in respect of a joint debt of the plaintiff and the defendant, paid by the plaintiff.
Money paid for calls.	The plaintiff's claim is	1. for money paid for calls upon shares, against which the defendant was bound to indemnify the plaintiff.
Money payable under award.	The plaintiff's claim is	1. for money payable under an award.
Life policy.	The plaintiff's claim is	1. upon a policy of insurance upon the life of X. Y., deceased.
Money bond.	The plaintiff's claim is	1. upon a bond to secure payment of £1,000, and interest.
Foreign Judgment.	The plaintiff's claim is	1. upon a judgment of the Court, in the Empire of Russia.
Bills of exchange, &c.	The plaintiff's claim is	1. upon a cheque drawn by the defendant.
	The plaintiff's claim is	1. upon a bill of exchange accepted [<i>or drawn or indorsed</i>] by the defendant.
	The plaintiff's claim is	1. upon a promissory note made [<i>or indorsed</i>] by the defendant.
	The plaintiff's claim is	1. against the defendant A. B. as acceptor, and against the defendant C. D. as drawer [<i>or indorser</i>] of a bill of exchange.
Surety.	The plaintiff's claim is	1. against the defendant as surety for the price of goods sold.
	The plaintiff's claim is	1. against the defendant A. B. as principal, and against the defendant C. D. as surety, for the price of goods sold [<i>or arrears of rent, or for money lent, or for money received by the defendant A. B. as traveller for the plaintiff, or, &c.</i>].
Del credere agent.	The plaintiff's claim is	1. against the defendant as a del

credere agent for the price of goods sold [*or as losses under a policy*].

The plaintiff's claim is *l.* for calls upon shares. Calls.

The plaintiff's claim is *l.* for crops, tillage, manure [*or Waygoing as the case may be*] left by the defendant as outgoing tenant of crops, &c. a farm.

This is Section I. of Part 2 of Schedule (A) to the Rules of Court drawn up in 1874 under the Principal Act.

SECTION III.

Indorsement for Costs, &c. [add to the above Forms].

And *l.* for costs; and if the amount claimed be paid to the plaintiff or his solicitor within four days [*or if the writ is to be served out of the jurisdiction, or notice in lieu of service allowed, insert the time for appearance limited by the order*] from the service hereof, further proceedings will be stayed.

This is Section III. of Part 2 of Schedule (A) to the Rules of Court drawn up in 1874 under the Principal Act.

It has reference to Order III. Rule 7 of the present Act, p. 287, *supra*. As to order limiting time, see p. 314.

SECTION IV.

Damages and other Claims (pp. 284 and 328).

The plaintiff's claim is for damages for breach of a contract to Agent, &c. employ the plaintiff as traveller.

The plaintiff's claim is for damages for wrongful dismissal from the defendant's employment as traveller [*and l. for arrears of wages*].

The plaintiff's claim is for damages for the defendant's wrongfully quitting the plaintiff's employment as manager.

The plaintiff's claim is for damages for breach of duty as factor [*or, &c.*] of the plaintiff [*and l. for money received as factor, &c.*].

The plaintiff's claim is for damages for breach of the terms Apprentices. of a deed of apprenticeship of X. Y. to the defendant [*or plaintiff*].

The plaintiff's claim is for damages for non-compliance with Arbitration. the award of X. Y.

The plaintiff's claim is for damages for assault [*and false im- Assault, &c. prisonment, and for malicious prosecution*].

The plaintiff's claim is for damages for assault and false im- By husband and prisonment of the plaintiff C. D. wife.

- Against husband and wife. The plaintiff's claim is for damages for assault by the defendant *C. D.*
- Solicitor. The plaintiff's claim is for damages for injury by the defendant's negligence as solicitor of the plaintiff.
- Bailment. The plaintiff's claim is for damages for negligence in the custody of goods [*and for wrongfully detaining the same*].
- Pledge. The plaintiff's claim is for damages for negligence in the keeping of goods pawned [*and for wrongfully detaining the same*].
- Hire. The plaintiff's claim is for damages for negligence in the custody of furniture lent on hire [*or a carriage lent*], [*and for wrongfully, &c.*].
- Banker. The plaintiff's claim is for damages for wrongfully neglecting [*or refusing*] to pay the plaintiff's cheque.
- Bill. The plaintiff's claim is for damages for breach of a contract to accept the plaintiff's drafts.
- Bond. The plaintiff's claim is upon a bond conditioned not to carry on the trade of a
- Carrier. The plaintiff's claim is for damages for refusing to carry the plaintiff's goods by railway.
The plaintiff's claim is for damages for refusing to carry the plaintiff by railway.
The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of coals by railway.
The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of machinery by sea.
- Charter-party. The plaintiff's claim is for damages for breach of charter-party of ship [*Mary*].
- Claim for return of goods damages. The plaintiff's claim is for return of household furniture, or, &c., or their value, and for damages for detaining the same.
- Damages for depriving of goods. The plaintiff's claim is for wrongfully depriving plaintiff of goods, household furniture, &c.
- Defamation. The plaintiff's claim is for damages for libel.
The plaintiff's claim is for damages for slander.
- Distress. Replevin. The plaintiff's claim is in replevin for goods wrongfully distrained.
- Wrongful distress. The plaintiff's claim is for damages for improperly distressing.
[*This Form shall be sufficient whether the distress complained of be wrongful, or excessive, or irregular, and whether the claim be for damages only, or for double value.*]
- Ejectment. The plaintiff's claim is to recover possession of a house, No. _____ in _____ street, or of a farm called Blackacre, situate in the parish of _____, in the county of _____

The plaintiff's claim is to establish his title to [*here describe property*], and to recover the rents thereof. To establish title and recover rents.

[*The two previous forms may be combined.*]

The plaintiff's claim is for dower. Dower.

The plaintiff's claim is for damages for infringement of the plaintiff's right of fishing. Fishery.

The plaintiff's claim is for damages for fraudulent misrepresentation on the sale of a horse [*or a business, or shares, or, &c.*]. Fraud.

The plaintiff's claim is for damages for fraudulent misrepresentation of the credit of *A. B.*

The plaintiff's claim is for damages for breach of a contract of guarantee for *A. B.* Guarantee.

The plaintiff's claim is for damages for breach of a contract to indemnify the plaintiff as the defendant's agent to distrain.

The plaintiff's claim is for a loss under a policy upon the ship "*Royal Charter*," and freight or cargo [*or for return of premiums*]. Insurance.

[*This form shall be sufficient whether the loss claimed be total or partial.*]

The plaintiff's claim is for a loss under a policy of fire insurance upon house and furniture. Fire insurance.

The plaintiff's claim is for damages for breach of a contract to insure a house.

The plaintiff's claim is for damages for breach of contract to keep a house in repair. Landlord and tenant.

The plaintiff's claim is for damages for breaches of covenants contained in a lease of a farm.

The plaintiff's claim is for damages for injury to the plaintiff from the defendant's negligence as a medical man. Medical man.

The plaintiff's claim is for damages for injury by the defendant's dog. Mischievous animal

The plaintiff's claim is for damages for injury to the plaintiff [*or, if by husband and wife, to the plaintiff, C. D.*] by the negligent driving of the defendant or his servants. Negligence

The plaintiff's claim is for damages for injury to the plaintiff while a passenger on the defendant's railway by the negligence of the defendant's servants.

The plaintiff's claim is for damages for injury to the plaintiff at the defendant's railway station, from the defective condition of the station.

The plaintiff's claim is as executor of *A. B.*, deceased, for damages for the death of the said *A. B.*, from injuries received while a passenger on the defendant's railway, by the negligence of the defendant's servants. Lord Campbell's Act.

- Promise of marriage. The plaintiff's claim is for damages for breach of promise of marriage.
- Quare impedit. The plaintiff's claim is in quare impedit for
- Seduction. The plaintiff's claim is for damages for the seduction of the plaintiff's daughter.
- Sale of goods. The plaintiff's claim is for damages for breach of contract to accept and pay for goods.
The plaintiff's claim is for damages for non-delivery [*or short delivery or defective quality, or other breach of contract of sale*] of cotton [*or, &c.*].
The plaintiff's claim is for damages for breach of warranty of a horse.
- Sale of land. The plaintiff's claim is for damages for breach of a contract to sell [*or purchase*] land.
The plaintiff's claim is for damages for breach of a contract to let [*or take*] a house.
The plaintiff's claim is for damages for breach of a contract to sell [*or purchase*] the lease, with goodwill, fixtures, and stock in trade of a public-house.
The plaintiff's claim is for damages for breach of covenant for title [*or for quiet enjoyment, or, &c.*] in a conveyance of land.
- Trespass to land. The plaintiff's claim is for damages for wrongfully entering the plaintiff's land and drawing water from his well [*or cutting his grass, or pulling down his timber, or pulling down his fences, or removing his gate, or using his road or path, or crossing his field, or depositing sand there, or carrying away gravel from thence, or carrying away stones from his river*].
- Support. The plaintiff's claim is for damages for wrongfully taking away the support of plaintiff's land [*or house, or mine*].
- Way. The plaintiff's claim is for damages for wrongfully obstructing a way [*public highway or a private way*].
- Watercourse &c. The plaintiff's claim is for damages for wrongfully diverting [*or obstructing, or polluting, or diverting water from*] a water-course.
The plaintiff's claim is for damages for wrongfully discharging water upon the plaintiff's land [*or into the plaintiff's mine*].
The plaintiff's claim is for damages for wrongfully obstructing the plaintiff's use of a well.
- Pasture. The plaintiff's claim is for damages for the infringement of the plaintiff's right of pasture.
[*This Form shall be sufficient whatever the nature of the right to pasture be.*]

The plaintiff's claim is for damages for obstructing the Light.
access of light to plaintiff's house.

The plaintiff's claim is for damages for the infringement of Sporting.
the plaintiff's right of sporting.

The plaintiff's claim is for damages for the infringement of Patent.
the plaintiff's patent.

The plaintiff's claim is for damages for the infringement of Copyright.
the plaintiff's copyright.

The plaintiff's claim is for damages for wrongfully using [*or Trade Mark.*
imitating] the plaintiff's trade mark.

The plaintiff's claim is for damages for breach of a contract Work.
to build a ship [*or to repair a house, &c.*].

The plaintiff's claim is for damages for breach of a contract
to employ the plaintiff to build a ship, &c.

The plaintiff's claim is for damages to his house, trees, crops, Nuisance.
&c., caused by noxious vapours from the defendant's factory
[*or, &c.*].

The plaintiff's claim is for damages from nuisances by noise
from the defendant's works [*or Stables, or, &c.*].

The plaintiff's claim is for damages for loss of the plaintiff's Innkeeper.
goods in the defendant's inn.

Add to Indorsement:

And for a mandamus.

Mandamus.

Add to Indorsement:

And for an injunction.

Injunction.

Add to Indorsement where claim is to land or to establish title,
or both.

And for mesne profits.

Mesne profits.

And for an account of rents or arrears of rent.

Arrears of rent.

And for breach of covenant for [*repairs*].

Breach of
covenant.

This is Section IV. of Part 2 of Schedule (A) to the Rules of
Court drawn up in 1874 under the Principal Act.

SECTION V.

Probate.

1. *By an executor or legatee propounding a will in solemn form.*

The plaintiff claims to be executor of the last will, dated the
day of _____, of C. W., late of _____
gentleman, deceased, who died on the _____ day of _____
and to have the said will established. This writ is issued against you as
one of the next of kin of the said deceased [*or as the case may be*].

2. *By an executor or legatee of a former will, or a next of kin, &c., of the
deceased, seeking to obtain the revocation of a probate granted in common
form.*

The plaintiff claims to be executor of the last will, dated the day of of C. D., late of gentleman, deceased, who died on the day of and to have the probate of a pretended will of the said deceased, dated the day of , revoked. This writ is issued against you as the executor of the said pretended will [or as the case may be].

3. *By an executor or legatee of a will when letters of administration have been granted as in an intestacy.*

The plaintiff claims to be executor of the last will of C. D., late of gentleman, deceased, who died on the day of dated the day of

The plaintiff claims that the grant of letters of administration of the personal estate of the said deceased obtained by you should be revoked, and probate of the said will granted to him.

4. *By a person claiming a grant of administration as a next of kin of the deceased, but whose interest as next of kin is disputed.*

The plaintiff claims to be the brother and sole next of kin of C. D., of , gentleman, deceased, who died on the day of , intestate, and to have as such a grant of administration to the personal estate of the said intestate. This writ is issued against you because you have entered a caveat, and have alleged that you are the sole next of kin of the deceased [or as the case may be].

This is Section V. of Part 2 of Schedule A) to the Rules of Court drawn up in 1874 under the Principal Act.

See Order III, Rule 5, p. 286.

(g.) SECTION VI.

Admiralty.

1. *Damage to vessel by collision.*

The plaintiffs, as owners of the vessel "Mary," of the port of claim 1,000*l.* against the brig or vessel "Jane," for damage occasioned by a collision which took place in the North Sea in the month of May last.

2. *Damage to cargo by collision.*

The plaintiffs, as owners of the cargo laden on board the vessel "Mary," of the port of , claim *l.* against the vessel "Jane," for damage done to the said cargo in a collision in the North Sea in the month of May last.

[The two previous forms may be combined.]

3. *Damage to cargo otherwise.*

The plaintiff, as owner of goods laden on board the vessel "Mary," on a voyage from Lisbon to England, claims from the owner of the said vessel *l.*, for damage done to the said goods during such voyage.

4. *In causes of possession.*

The plaintiff, as sole owner of the vessel "Mary," of the port of

, claims to have possession decreed to him of the said vessel.

5. The plaintiff claims possession of the vessel "Mary," of the port of , as owner of 48-64th shares of the said vessel against *C. D.* owner of 16-64th shares of the said vessel.

6. The plaintiff, as part owner of the vessel "Mary," claims against *C. D.*, part owner, and his shares in the said vessel £, as part of the earnings of the said vessel due to plaintiff.

7. The plaintiff, as owner of 48-64th shares of the vessel "Mary," of the port of , claims possession of the said brig as against *C. D.*, the master thereof.

8. The plaintiff, under a mortgage, dated the day of claims against the vessel "Mary," £, being the amount of his mortgage thereon, and £ for interest.

9. The plaintiff, as assignee of a bottomry bond, dated the day of , and granted by *C. D.*, as master of the vessel "Mary," of the port of , to *A. B.*, at St. Thomas's, in the West Indies, claims £ against the vessel "Mary," and the cargo laden thereon.

10. *By a part owner of a vessel.*

The plaintiff, as owner of 24-64th shares of the vessel "Mary," being dissatisfied with the management of the said vessel by his co-owners, claims that his co-owners shall give him a bond in £, for the value of the plaintiff's said shares in the said vessel.

11. The plaintiffs, as owners of the derelict vessel "Mary," of the port of , claim to be put in possession of the said vessel and her cargo.

12. *By salvors.*

The plaintiffs, as the owners, master and crew of the vessel "Caroline," of the port of , claim the sum of £, for salvage services performed by them to the vessel "Mary," off the Goodwin Sands, on the day of

13. *Claim for towage.*

The plaintiffs, as owners of the steam-tug "Jane," of the port of , claim £, for towage services performed by the said steam-tug to the vessel "Mary," on the day of

14. *Seamen's wages.*

The plaintiffs, as seamen on board the vessel "Mary," claim £, for wages due to them, as follows (1), the mate 30% for two months' wages from the day of

15. *For necessaries.*

The plaintiffs claim £, for necessaries supplied to the vessel "Mary," at the port of Newcastle-on-Tyne, delivered on the day of and the day of .

This is Section VI. of Part 2 of Schedule (A) to the Rules of Court drawn up in 1874 under the Principal Act.

See Part I, Section 4, *supra*.

SECTION VII.

Special Indorsements under Order III, Rule 6, p. 286.

1. The plaintiff's claim is for the price of goods sold. The following are the particulars:—

1873—31st December.—	£	s.	d.
Balance of account for butcher's meat to this date	35	10	—
1874—1st January to 31st March.—			
Butcher's meat supplied	74	5	—
	109	15	—
1874—1st February.—Paid.	45	—	—
Balance due	£	64	15 —

2. The plaintiff's claim is against the defendant *A. B.* as principal, and against the defendant *C. D.* as surety, for the price of goods sold to *A. B.* The following are the particulars:—

1874—2nd February. Guarantee by *C. D.* of the price of woollen goods to be supplied to *A. B.*

	£	s.	d.
2nd February—To goods	47	15	—
3rd March—To goods	105	14	—
17th March—To goods	14	12	—
5th April—To goods	34	—	—
	£	202	1 —

3. The plaintiff's claim is against the defendant, as maker of a promissory note. The following are the particulars:

Promissory note for 250*l.*, dated 1st January, 1874, made by defendant, payable four months after date.

Principal- - - - -	£	250
Interest - - - - -		

4. The plaintiff's claim is against the defendant *A. B.* as acceptor, and against the defendant *C. D.* as drawer, of a bill of exchange. The following are the particulars:—

Bill of exchange for £500, dated 1st January, 1874, drawn by defendant *C. D.* upon and accepted by defendant *A. B.*, payable three months after date.

Principal- - - - -	£	500
Interest - - - - -		

5. The plaintiff's claim is for principal and interest due upon a bond. The following are the particulars:—

Bond dated 1st January, 1873. Condition for payment of £100, on the 26th December, 1873.

	£
Principal due	50
Interest - - - - -	

6. The plaintiff's claim is for principal and interest due under a covenant.

The following are the particulars:—

Deed dated covenant to pay £100 and interest.

	£
Principal due - - - - -	80
Interest - - - - -	

This is Section VII of Part 2 of Schedule (A) to the Rules of Court drawn up in 1874 under the Principal Act, the heading "Special Indorsements under Order III, Rule 6," being substituted for "Special Indorsements under Clause 7 of the Schedule," in order to adapt the forms to the present Act.

SECTION VIII.

Indorsements of Character of Parties.

Executors. The plaintiff's claim is as executor [*or administrator*] of *C. D.*, deceased, for, &c.

The plaintiff's claim is against the defendant *A. B.*, as executor [*or, &c.*] of *C. D.*, deceased, for, &c.

The plaintiff's claim is against the defendant *A. B.*, as executor of *X. Y.*,

deceased, and against the defendant *C. D.*, in his personal capacity for, &c.

By husband and wife, executrix. The claim of the plaintiff *C. D.* is as executrix of *X. Y.* deceased, and the claim of the plaintiff *A. B.*, as her husband, for

Against husband and wife, executrix. The claim of the plaintiff is against the defendant *C. D.*, as executrix of the defendant *C. D.*, deceased, and against the defendant *A. B.*, as her husband for

Trustee in bankruptcy. The plaintiff's claim is as trustee under the bankruptcy of *A. B.*, for

The plaintiff's claim is against the defendant as trustee under the bankruptcy of *A. B.*, for

Trustees. The plaintiff's claim is as [*or the plaintiff's claim is against the defendant as*] trustee under the will of *A. B.* [*or under the settlement upon the marriage of A. B. and X. Y. his wife*].

Public officer. The plaintiff's claim is as public officer of the bank for

The plaintiff's claim is against the defendant as public officer of the bank, for

The plaintiff's claim is against the defendant *A. B.* as principal, and against the defendant *C. D.* as public officer of the bank, as surety, for

The plaintiff's claim is against the defendant as heir-at-law of *A. B.*, deceased. Heir and devisee.

The plaintiff's claim is against the defendant *C. D.* as heir-at-law, and against the defendant *E. F.* as devisee of lands under the will of *A. B.*

The plaintiff's claim is as well for the Queen as for himself, *Qui tam* action. for

This is Section VIII of Part 2 of Schedule (A) to the Rules of Court drawn up in 1874 under the Principal Act.

This Section illustrates Order III, Rule 4 of the present Act, p. 286, *supra*.

APPENDIX (B).

The forms in this Appendix are identical with the forms contained in Schedule (B) to the Rules of Court drawn up in 1874 under the Principal Act, with the addition of two new forms, numbered, respectively, 15 and 16, at the end of the Appendix.

FORM 1.

Notice by Defendant to Third Party.

187 . [Here put the letter and number.]

Notice filed , 187 .

In the High Court.

Queen's Bench Division.

Between *A. B.*, plaintiff,

and

C. D., defendant.

To Mr. X. Y.

Take notice that this action has been brought by the plaintiff against the defendant [as surety for *M. N.*, upon a bond conditioned for payment of £2,000 and interest to the plaintiff.

The defendant claims to be entitled to contribution from you to the extent of one-half of any sum which the plaintiff may recover against him, on the ground that you are [his co-surety under the said bond, or, also surety for the said *M. N.*, in respect of the said matter, under another bond made by you in favour of the said plaintiff, dated the day of

, A.D.

]].

Or, [as acceptor of a bill of exchange for £500, dated the

day of _____ A.D. _____, drawn by you before and accepted by the defendant, and payable three months after date.

The defendant claims to be indemnified by you against liability under the said bill, on the ground that it was accepted for your accommodation.]

Or, [to recover damages for a breach of a contract for the sale and delivery to the plaintiff of 1,000 tons of coal.

The defendant claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent].

And take notice that, if you wish to dispute the plaintiff's claim in this action as against the defendant *C. D.*, you must cause an appearance to be entered for you within eight days after service of this notice.

In default of your so appearing, you will not be entitled in any future proceeding between the defendant *C. D.* and yourself to dispute the validity of the judgment in this action whether obtained by consent or otherwise.

(Signed) _____ *E. T.*

Or,

X. Y.,

Solicitor for the defendant,
E. T.

Appearance to be entered at

This is Form I of Schedule (B) to the Rules of Court drawn up in 1874 under the Principal Act.

The form illustrates Order XVI, Rules 17 and 18, of the present Act, p. 347, *supra*.

FORM 2.

187 . [Here put the letter and number.]

In the High Court.

Queen's Bench Division.

Between *A. B.*, plaintiff,
and

C. D., defendant.

The plaintiff confesses the defence stated in the paragraph of the defendant's statement of defence [or, of the defendant's further statement of defence].

This is Form II of Schedule (B) to the Rules of Court drawn up in 1874 under the Principal Act.

The form is intended to illustrate Order XX, Rule 3, of the present Act, p. 373, *supra*.

FORM 3.

187 . [*Here put the letter and number.*]

In the High Court of Justice.

Division.

Between *A. B.*, plaintiff,

and

C. D., defendant.

The particulars of the plaintiff's complaint herein, and of the relief and remedy to which he claims to be entitled, appear by the indorsement upon the writ of summons.

This is Form III of Schedule (B) to the Rules of Court drawn up in 1874 under the Principal Act.

The form is intended to illustrate Order XXI, Rule 4, of the present Act, *supra*.

FORM 4.

"To the within-named *X. Y.*

"Take notice, that if you do not appear to the within counter-claim of the within-named *C. D.* within eight days from the service of this defence and counter-claim upon you, you will be liable to have judgment given against you in your absence.

"Appearances are to be entered at

This is Form IV of Schedule (B) to the Rules of Court drawn up in 1874 under the Principal Act.

This form is intended to illustrate Order XXII, Rules 5 and 6 of the present Act, pp. 378-9, *supra*.

FORM 5.

Notice of Payment into Court.

In the High Court of Justice.

1875. B. No.

Q. B. Division.

A. B. v. C. D.

Take notice, that the defendant has paid into Court £ , and says that that sum is enough to satisfy the plaintiff's claim [*or the plaintiff's claim for, &c.*]

To Mr. *X. Y.*,

the plaintiff's solicitor.

Z.,

Defendant's solicitor.

This is Form V of Schedule (B) to the Rules of Court drawn up in 1874 under the Principal Act.

The form is the one required to be used under and by Order XXX, Rule 2, of the present Act, p. 404, *supra*.

FORM 6.

Acceptance of Sum paid into Court.

In the High Court of Justice.

1875. B. No.

Q. B. Division.

A. B. v. C. D.

Take notice that the plaintiff accepts the sum of £ paid by you into Court in satisfaction of the claim in respect of which it is paid in.

This is Form VI of Schedule (B), to the Rules of Court drawn up in 1874 under the Principal Act. The form is the one required to be used under and by Order XXX, Rule 4, of the present Act, p. 405, *supra*.

FORM 7.

Form of Interrogatories.

In the High Court of Justice.

1874. B. No.

Division.

Between *A. B.*, plaintiff,
and

C. D., *E. F.* and *G. H.*, defendants.

Interrogatories on behalf of the above-named [*plaintiff*, or *defendant C. D.*] for the examination of the above-named [*defendants E. F. and G. H.*, or *plaintiff*].

1. Did not, &c.

2. Has not, &c.

&c. &c. &c.

[THE DEFENDANT *E. F.* IS REQUIRED TO ANSWER THE INTERROGATORIES
NUMBERED].

[THE DEFENDANT *G. H.* IS REQUIRED TO ANSWER THE INTERROGATORIES
NUMBERED].

This is Form VII of Schedule (B) to the Rules of Court drawn up in 1874 under the Principal Act.

The form is intended to illustrate Order XXXI, Rule 3, of the present Act, *supra*. Interrogatories in Chancery were in writing.

FORM 8.

Form of Answer to Interrogatories.

In the High Court of Justice.

1874. B. No.

Division.

Between *A. B.*, plaintiff,
and

C. D., *E. F.*, and *G. H.*, defendants.

The answer of the above-named defendant *E. F.* to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named *E. F.*, make oath and say as follows :—

This is Form VIII of Schedule (B) to the Rules of Court drawn up in 1874 under the Principal Act.

The form is intended to illustrate Order XXXI, Rules 6 and 7, of the present Act, pp. 408–9, *supra*.

FORM 9.

Form of Affidavit as to Documents.

In the High Court of Justice.

1874. B.

Division.

Between *A. B.*, plaintiff,
and

C. D., defendant.

I, the above-named defendant *C. D.*, make oath and say as follows :—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first Schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first Schedule hereto.

3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*].

4. I have had, but have not now, in my possession or power, the documents relating to the matters in question in this suit set forth in the second Schedule hereto.

5. The last-mentioned documents were last in my possession or power on [*state when*].

6. That [*here state what has become of the last-mentioned documents, and in whose possession they now are*].

7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of, or extract from any such document, or any other document whatsoever, relating to the matters in

question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second Schedules hereto.

This is Form IX of Schedule (B) to the Rules of Court drawn up in 1874 under the Principal Act.

This form is intended to illustrate Order XXXI, Rule 13, of the present Act, p. 411, *supra*. (See note to that Rule).

FORM 10.

Form of Notice to produce Documents.

In the High Court of Justice.

Q. B. Division.

A. B. v. C. D.

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*statement of claim or defence, or affidavit, dated the* *day of* *A.D.*]

Describe documents required.

X. Y.,

Solicitor to the

To Z.,

Solicitor for

This is Form X of Schedule (B) to the Rules of Court drawn up in 1874 under the Principal Act.

The form is the one required to be used under and by Order XXXI, Rule 15, of the present Act, p. 412, *supra*.

FORM 11.

Form of Notice to inspect Documents.

In the High Court of Justice.

Q. B. Division.

A. B. v. C. D.

Take notice that you can inspect the documents mentioned in your notice of the day of *A.D.* [*except the deed numbered in that notice*] at my office, on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of the documents mentioned in your notice of the day of *A.D.*, on the ground that [*state the ground*].

This is Form XI of Schedule (B) to the Rules of Court drawn up in 1874 under the Principal Act.

This form is intended to illustrate Order XXXI, Rule 16, of the present Act, p. 413, *supra*.

FORM 12.

Form of Notice to admit Documents.

In the High Court of Justice.

Division.

A. B. v. C. D.

Take notice, that the plaintiff [*or defendant*] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or plaintiff*] his solicitor or agent, at _____, on _____, between the hours of _____; and the defendant [*or plaintiff*] is hereby required within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c.

To *E. F.* Solicitor [*or Agent*] for Defendant [*or Plaintiff*].

G. H. Solicitor [*or Agent*] for Plaintiff [*or Defendant*].

[*Here describe the Documents the manner of doing which may be as follows :—*]

ORIGINALS.

Description of Documents.	Dates.
Deed of Covenant between <i>A. B.</i> and <i>C. D.</i> , first part, and <i>E. F.</i> , second part	January 1 .. 1848
Indenture of Lease from <i>A. B.</i> to <i>C. D.</i>	February 1 .. 1848
Indenture of Release between <i>A. B.</i> , <i>C. D.</i> , first part, &c.	February 2 .. 1848
Letter, Defendant to Plaintiff	March 1 .. 1848
Policy of Insurance on Goods by Ship " <i>Isabella</i> ," on voyage from Oporto to London	December 3 .. 1847
Memorandum of Agreement between <i>C. D.</i> , Captain of said Ship, and <i>E. F.</i>	January 1 .. 1848
Bill of Exchange for £100 at three months, drawn by <i>A. B.</i> on and accepted by <i>C. D.</i> , indorsed by <i>E. F.</i> and <i>G. H.</i>	May 1 .. 1849

COPIES.

Description of Documents.	Dates.	Original or Duplicate, served, sent, or delivered, when, how and by whom.
Register of Baptism of <i>A.B.</i> in the Parish of <i>X</i>	January 1.. 1848	
Letter, plaintiff to defendant	February 1 1848	Sent by General Post, 2 February, 1848
Notice to produce papers ..	March 1 .. 1848	Served, 2 March, 1848, on defendant's attorney, by <i>E.F.</i> of—
Record of a Judgment of the Court of Queen's Bench, in an action, <i>J.S. v. J.N.</i> ..	Trinity Term, 10th Vict.	
Letters Patent of King Charles II. in the Rolls Chapel ..	January 1 1680.	

This is Form XII of Schedule (B) to the Rules of Court drawn up in 1874 under the Principal Act.

The form is intended to illustrate Order XXXII, Rules 2 and 3, of the present Act, pp. 417-18, *supra*.

It will be seen that this form is identical in every particular (except the heading), with the form of Notice to admit documents set forth in the General Rules of Hilary Term, 1853, Rule 29.

FORM 13.

Setting down Special Case.

In the High Court of Justice.
Division.

1875. B. No.

Between *A. B.*, plaintiff,
and

C. D. and others, defendants.

Set down for argument the special case filed in this action on the
day of , 187 .

X. Y., solicitor for

This is Form XIII of Schedule (B) to the Rules of Court drawn up in 1874 under the Principal Act.

This form is the one required to be used under and by Order XXXIV, Rule 5, of the present Act, p. 422, *supra*.

Forms of Statement of Special Case will be found in the Schedule to the Rules of Michaelmas Vacation, 1854, Nos. 11 and 14.

FORM 14.

Form of Notice of Trial.

In the High Court of Justice.

Division.

A. B. v. C. D.

Take notice of trial of this action [*or of the issues in this action ordered to be tried*] BY A JUDGE AND JURY [*or as the case may be*] IN MIDDLESEX, [*or as the case may be*] for the day of next.

X. Y., plaintiff's solicitor [*or as the case may be*].

Dated

To Z., defendant's solicitor [*or as the case may be*].

This is Form XIV of Schedule (B) to the Rules of Court drawn up in 1874 under the Principal Act.

The form is intended to illustrate Order XXXVI, Rules 3 to 15, and especially Rule 8, p. 436. (See note to that Rule, p. 436.)

No particular form of words was necessary to constitute a good notice of trial, provided it clearly informed the party in sufficient time when and where the cause was to be tried.*

FORM 15.

Form of Certificate of officer after trial by a Jury.

30th November, 1876.

1876. No.

In the High Court of Justice.

Division.

Between *A. B.*, plaintiff,
and

C. D., defendant.

I certify that this action was tried before the Honourable Mr. Justice and a special jury of the county of on the 12th and 13th days of November, 1876.

* *Cory v. Hotsun*, 1 L. M. and P. 23. Day's Common Law Procedure Acts, P. 124 (4th edition). See *Fenn v. Green* 6, E. and B., 656. *Kerry v. Reynolds*, 4 Dowl., 234.

The jury found [*state findings*].

The Judge directed that judgment should be entered for the plaintiff for £ with costs of summons [*or as the case may be*].

A.B.

[*Title of officer.*]

This form is new. It illustrates Order XXXVI, Rule 24, p. 444, *supra*. See note to Order XL, Rule 5.

FORM. 16.

Affidavit of Scripts.

In the High Court of Justice.

Probate Division.

Between A.B. - - - - - plaintiff,

and

C.D. - - - - - defendant.

I, A.B., of , in the county of

party in this cause, make oath and say, that no paper or parchment writing, being or purporting to be or having the form or effect of a will or codicil or other testamentary disposition of E.F., late of , in the county of , deceased, the deceased in this cause, OR BEING OR PURPORTING TO BE INSTRUCTIONS FOR, OR THE DRAFT OF, ANY WILL, OR TESTAMENTARY DISPOSITION OF THE SAID E.F., has at any time, either before or since his death, come to the hands, possession, or knowledge of me, this deponent, or to the hands, possession, or knowledge of my solicitors in this suit, so far as is known to me, this deponent, save and except the true and original last will and testament of the said deceased now remaining in the principal registry of this court [*or hereunto annexed or as the case may be*], the said will bearing date the day of 18 [*or as the case may be*], also save and except [*here add the dates and particulars of any other testamentary papers of which the deponent has any knowledge*].

(Signed) A.B.,

Sworn at on the day of 18

Before me,

[*Person authorised to administer oaths under the Act.*]

This form illustrates Order XXI, Rule 2, p. 375. Except the words in small capital letters, this form is copied from the Schedule (No. 10) to the Rules of the Court of Probate in contentious business.

APPENDIX (C).

The forms in this Appendix, with the exception of Nos. 28 and 29 (which are copied from Schedule (C.) to the Rules of Court drawn up in 1874 under the Principal Act), are new.

Appendix (C) is intended to illustrate Order XIX, Rule of the present Act, p. 357, *supra*.

No. 1.

ACCOUNT STATED

In the High Court of Justice.

Division.

Writ issued 3rd August, 1875.

Between *A.B.* - - - , plaintiff,
and
E.F. - - - defendant.

Statement of Claim.

1. Between the 1st of January and the 28th of February, 1875, the plaintiff supplied to the defendant various articles of drapery; and accounts and invoices of the goods so supplied, and their prices, were from time to time furnished to the defendant, and payments on account were from time to time made by the defendant.

2. On the 28th of February, 1875, a balance remained due to the plaintiff of £75. 9s., and an account was on that day sent by the plaintiff to the defendant showing that balance.

3. On the 1st of March following, the plaintiff's collector saw the defendant at his house, and asked for payment of the said balance, and the defendant then paid him by cheque £25 on account of the same. The residue of the said balance, amounting to £50. 9s., has never been paid.

The plaintiff claims £

The plaintiff proposes that this action should be tried in the county of Northampton.

[*Title as in claim, omitting date of issue of writ.*]

Statement of Defence.

Reply 1. The defendants deny that the said commission of per cent. mentioned in paragraph 4 of the claim is the rate of commission ordinarily charged by del credere agents in the said trade, and say that the same is the ordinary commission for agents other than del credere agents, and they deny that they ever accounted to the plaintiffs for the price of any goods, except after they had received the same from the purchasers.

2. The defendants deny that they were ever liable to the plaintiffs as del credere agents.

3. With respect to the eighth paragraph of the plaintiff's statement of claim, the defendants say that at the time of the said sale to the said *G. H.*, the said *G. H.* was a person in good credit. If it be true that the said *G. H.* was then in insolvent circumstances (which the defendants do not admit), the defendants did not and had no reason to suspect the same, and could not by ordinary care or diligence have ascertained the fact.

[*Title as in defence.*]

Reply.

The plaintiffs join issue upon the defendants' statement of defence.

No. 2.

ADMINISTRATION OF ESTATE.

In the High Court of Justice.

[1876. B. No. 233.]

Chancery Division.

Name of [Judge.]

Writ issued 22nd December, 1876.

In the matter of the estate of *A.B.*, deceased.

Between *E.F.* - - - - plaintiff,

and

G.H. - - - - defendant.

Statement of Claim.

1. *A.B.* of *K.*, in the county of *L.*, died on the 1st of July, 1875, intestate. The defendant *G.H.* is the administrator of *A.B.*

2. *A.B.* died entitled to lands in the said county for an estate of fee simple, and also to some other real estate and to personal estate. The defendant has entered* possession of the real estate of *A.B.* and received the rents thereof. The legal estate in such real estate is outstanding in mortgages under mortgages created by the intestate.

3. *A.B.* was never married: he had one brother only, who predeceased him without having been married, and two sisters only, both of whom also predeceased him, namely *M.N.* and *P.Q.* The plaintiff is the only child of *M.N.*, and the defendant is the only child of *P.Q.*

The plaintiff claims—

1. To have the real and personal estate of *A.B.* administered in this court, and for that purpose to have all proper directions given and accounts taken.
2. To have a receiver appointed of the rents of his real estate.
3. Such further or other relief as the nature of the case may require.

[1876. B. No. 233.]

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]

In the matter of the estate of *A.B.*, deceased.

Between *E.F.* - - - - plaintiff,

and

G.H. - - - - defendant.

Statement of Defence.

1. The plaintiff is an illegitimate child of *M.N.* She was never married.

* The word "into" has evidently been omitted here.

3. The personal estate of *A.B.* was not sufficient for the payment of his debts, and has all been applied in payment of his funeral and testamentary expenses, and part of his debts.

1. *A.B.* of *K.*, in the county of *L.*, duly made his last will, dated the 1st day of March, 1873, whereby he appointed the defendant and *M.N.* (who died in the testator's lifetime) executors thereof, and devised and bequeathed his real and personal estate to and to the use of his executors in trust to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his real estate for the person who would be the testator's heir-at-law, and as to his personal estate for the persons who would be the testator's next of kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The testator died on the 1st day of July, 1873, and his will was proved by the defendant on the 4th of October, 1873. The plaintiff has not been married.

3. The testator was at his death entitled to real and personal estate; the defendant entered into the receipt of the rents of the real estate and got in the personal estate; he has sold some part of the real estate.

The plaintiff claims—

1. To have the real and personal estate of *A.B.* administered in this court, and for that purpose to have all proper directions given and accounts taken.
2. Such further or other relief as the nature of the case may require.

[1876. B. No. 234.]

In the High Court of Justice.

Chancery Division.

[Name of Judge.]

In the matter of the estate of *A.B.*, deceased.

Between E.F. - - - plaintiff,
 and
G.H. - - - defendant.

Statement of Defence.

1. *A.B.*'s will contained a charge of debts; he died insolvent; he was entitled at his death to some real estate which the defendant sold, and which produced the net sum of £4,300, and the testator had some personal estate which the defendant got in and which produced the net sum of £1,204. The defendant applied the whole of the said sums and the sum of £84, which the defendant received from rents of the real estate, in the payment of the funeral and testamentary expenses, and some of the debts of the testator. The defendant made up his accounts and sent a copy thereof to the plaintiff on the 10th of January, 1875, and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer. The defendant submits that the plaintiff ought to pay the costs of this action.

[1876. B. No. 234.]

In the High Court of Justice.

Chancery Division.

[Name of Judge.]

In the matter of the estate of *A.B.*, deceased.

Between *E.F.* - - - - - - plaintiff,
 and
G.H. - - - - - - defendant.

The plaintiff joins issue with the defendant upon his defence.

[1876. B. No. 235.]

[Name of Judge.]

Writ issued 22nd December, 1876.

Between A.B. and C. his wife - - - plaintiffs,
 and
E.F. and G.H. - - - defendants.

1. W. H., of H., in the county of L., duly made his last will, dated the 19th day of March, 1861, whereby he appointed the defendants the executors thereof, and bequeathed to them all his personal estate in trust, to call in, sell, and convert the same into money, and thereout to pay his debts and funeral and testamentary expenses, and to divide the ultimate surplus into three shares, and to pay one of such three shares to each of his two children, T. H., and E., the wife of E. W., and to stand possessed of the remaining third share upon trust for the children of the testator's son J. H. in equal shares, to be divided among them when the youngest of such children should attain the age of 21 years. And the testator devised his real estates to the defendants upon trust until the youngest child of the said J. H. should attain the age of 21 years, to pay one third part of the rents thereof to the said T. H., and one other third part thereof to the said E. W., and to accumulate the remaining third part by way of compound interest, and so soon as the youngest child of the said J. H. should attain the age of 21 years, to sell the said real estates, and out of the proceeds of such sale to pay the sum of £1,000 to the said T. H., and to invest one moiety of the residue in manner therein mentioned, and stand possessed thereof in trust to pay the income thereof to the said E., the wife of the said E. W., during her life for her separate use, and after her death for her children, the interests of such children being contingent on their attaining the age of 21 years, and to divide the other moiety of such proceeds of sale and the accumulations of the third share of rents thereinbefore directed to be accumulated among such of the children of the said J. H. as should be then living, and the issue of such of them as should be then dead, in equal shares per stirpes.

2. The testator died on the 25th day of April, 1873, and his said will was proved by the defendants in the month of June, 1862.

3. The testator died possessed of one third share in a leasehold colliery

called the Paradise Colliery, and in the engines, machinery, stock in trade, book debts, and effects belonging thereto. He was also entitled to real estate, and other personal estate.

4. The testator left T. H. and E., the wife of E. W., him surviving. J. H. had died in the testator's lifetime, leaving four children, and no more. The plaintiff C. B. is the youngest of the children of J. H. and attained the age of 21 years on the 1st of June 1871. The other three children of J. H. died without issue in the lifetime of the testator.

5. E. W. has several children, but no child has attained the age of 21 years.

6. T. H. is the testator's heir-at-law.

7. The defendants have not called in, sold, and converted into money the whole of the testator's personal estate, but have allowed a considerable part thereof to remain outstanding; and in particular the defendants have not called in, sold, or converted into money the testator's interest in the said colliery, but have, from the death of the testator to the present time, continued to work the same in partnership with the other persons interested therein. The estate of the testator has sustained considerable loss by reason of such interest not having been called in, sold, or converted into money.

8. The defendants did not upon the death of the testator sell the testator's furniture, plate, linen, and china, but allowed the testator's widow to possess herself of a great part thereof, without accounting for the same, and the same has thereby been lost to the testator's estate.

9. The defendants have not invested the share of the testator's residuary personal estate given by his will to the children of the testator's son J. H. and have not accumulated one-third of the rents and profits of his real estate as directed by the said will, but have mixed the same share and rents with their own moneys, and employed them in business on their own account.

10. The defendants have sold part of the real estates of the testator but a considerable part thereof remains unsold.

11. A receiver ought to be appointed of the outstanding personal estate of the testator, and the rents and profits of his real estate remaining unsold.

The plaintiffs claim :—

1. That the estate of the said testator may be administered, and the trusts of his will carried into execution under the direction of the court.
2. That it may be declared that the defendants, by carrying on the business of the said colliery instead of realizing the same, have committed a breach of trust, and that the parties interested in the testator's estate are entitled to the value of the testator's interest in the said partnership property as it stood at the testator's death

with interest thereon, or at their election to the profits which have been made by the defendants in respect thereof since the testator's death, whichever shall be found most for their benefit.

3. That an account may be taken of the interest of the testator in the said colliery, and in the machinery, book debts, stock, and effects belonging thereto, according to the value thereof at the testator's death, and an account of all sums of money received by or by the order, or for the use of the defendants, or either of them, on account of the testator's interest in the said colliery, and that the defendants may be ordered to make good to the estate of the testator the loss arising from their not having realized the interest of the testator in the said colliery within a reasonable time after his decease.
4. That an account may be taken of all other personal estate of the testator come to the hands of the defendants, or either of them, or to the hands of any other person by their or either of their order, or for their or either of their use, or which, but for their wilful neglect or default, might have been so received; and an account of the rents and profits of the testator's real estate, and the moneys arising from the sale thereof, possessed or received by or by the order, or for the use of the defendants, or either of them.
5. That the real estate of the testator remaining unsold may be sold under the direction of the court.
6. That the defendants may be decreed, at the election of the parties interested in the testator's estate, either to pay interest at the rate of £5 per cent. per annum upon such moneys belonging to the estate of the testator as they have improperly mixed with their own moneys and employed in business on their own account, and that half-yearly tests may be made in taking such account as respects all moneys which by the said will were directed to be accumulated, or to account for all profits by the employment in their business of the said trust money.
7. That a receiver may be appointed of the outstanding personal estate of the testator, and to receive the rents and profits of his real estate remaining unsold.
8. Such further or other relief as the nature of the case may require.

[1876. B. 235.]

In the High Court of Justice,
Chancery Division.

[*Name of Judge.*]

Between *A.B.* and *C.* his wife -
and
E.F. and *G.H.* -

- Plaintiffs,

Defendants.

Statement of Defence of the above-named Defendants.

Defence.—1. Shortly after the decease of the testator, the defendants, as his executors, possessed themselves of and converted into money the testator's personal estate, except his share in the colliery mentioned in the plaintiffs' statement of claim. The moneys so arising were applied in payment of part of the testator's debts and funeral and testamentary expenses, but such moneys were not sufficient for the payment thereof in full.

2. The Paradise colliery was, at the testator's decease, worked by him in partnership with J. Y., and W. Y., and T. Y., both since deceased. No written articles of partnership had been entered into, and for many years the testator had not taken any part in the management of the said colliery, but it was managed exclusively by the other partners, and the defendants did not know with certainty to what share therein the testator was entitled.

3. Upon the death of the testator, the defendants endeavoured to ascertain the value of the testator's share in the colliery, but the other partners refused to give them any information. The defendants thereupon had the books of the colliery examined by a competent accountant, but they had been so carelessly kept that it was impossible to obtain from them any accurate information respecting the state of the concern; it was, however, ascertained that a considerable sum was due to the testator's estate.

4. Between the death of the testator and the beginning of the year 1874 the defendants made frequent applications to J. Y., W. Y., and T. Y. for a settlement of the accounts of the colliery. Such applications having proved fruitless, the defendants, in January, 1874, filed their bill of complaint in the Court of Chancery against J. Y., W. Y., and T. Y., praying for an account of the partnership dealings between the testator and the defendants thereto, and that the partnership might be wound up under the direction of the Court.

5. The said T. Y. died in the year 1874, and the suit was revived against J. P. and T. S., his executors. The suit is still pending.

6. As to the Paradise colliery, the defendants have acted to the best of their judgment for the benefit of the testator's estate, and they deny being under any liability in respect of the said colliery not having been realised. They submit to act under the direction of the Court as to the further prosecution of the said suit and generally as to the realization of the testator's interest in the said colliery.

7. With respect to the statements in the eighth paragraph of the statement of claim, the defendants say, that upon the death of the testator, they sold the whole of his furniture, linen, and china, and also all his plate, except a few silver teaspoons of very small value, which were taken possession of by his widow, and they applied the proceeds of such sale as part of the testator's personal estate, and they deny being under any liability in respect of such furniture, linen, china, and plate.

8. With respect to the statements in paragraph seven of the statement

down to the 187 , continued to consign to the defendants, as their agents, large quantities of their manures for sale, and the defendants sold the same, and received the price thereof and accounted to the plaintiffs therefor.

4. No express agreement has ever been entered into between the plaintiffs and the defendants with respect to the terms of the defendants' employment as agents. The defendants have always charged the plaintiffs a commission at per cent. on all sales effected by them, which is the rate of commission ordinarily charged by *del credere* agents in the said trade. And the defendants, in fact, always accounted to the plaintiffs for the price, whether they received the same from the purchasers or not.

5. The plaintiffs contend that the defendants are liable to them as *del credere* agents, but if not so liable are under the circumstances herein-after mentioned liable as ordinary agents.

6. On the , the plaintiffs consigned to the defendants for sale a large quantity of goods, including tons of

7. On or about the , the defendants sold tons of part of such goods to one *G.H.* for £ , at three months' credit, and delivered the same to him.

8. *G.H.* was not, at that time, in good credit and was in insolvent circumstances, and the defendants might, by ordinary care and diligence, have ascertained the fact.

9. *G.H.* did not pay for the said goods, but before the expiration of the said three months for which credit had been given was adjudicated a bankrupt, and the plaintiffs have never received the said sum of £ or any part thereof.

The plaintiffs claim:—

1. Damages to the amount of £ .

2. Such further or other relief as the nature of the case may require.

The plaintiffs propose that this action should be tried in the county of

No. 6.

BILL OF EXCHANGE.

187 . B. No.

In the High Court of Justice,
Division.

Writ issued 3rd August, 1876.

Between *A.B.* and *C.D.* - - - - Plaintiffs,
and

E.F. and *G.H.* - - - - Defendants.

Statement of Claim.

1. Messrs. *M.N. & Co.* on the day of drew a bill of exchange upon the defendants for £ payable to the

order of the said *M.N. & Co.* three months after date, and the defendants accepted the same.

2. Messrs. *M.N. & Co.* indorsed the bill to the plaintiffs.

3. The bill became due on the _____, and the defendant has not paid it.

The plaintiffs claim :—

[*Title.*]

Statement of Defence.

1. The bill of exchange mentioned in the statement of claim was drawn and accepted under the circumstances hereinafter stated, and except as hereinafter mentioned there never was any consideration for the acceptance or payment thereof by the defendants.

2. Shortly before the acceptance of the said bill it was agreed between the said Messrs. *M.N. & Co.*, the drawers thereof, and the defendants, that the said Messrs. *M.N. & Co.* should sell and deliver to the defendants free on board ship at the port of _____ 1,200 tons of coals during the month of _____, and that the defendants should pay for the same by accepting the said Messrs. *M.N. & Co.*'s draft for £ _____ at six months.

3. The said Messrs. *M.N. & Co.* accordingly drew upon the defendants, and the defendants accepted the bill of exchange now sued upon.

4. The defendants did all things which were necessary to entitle them to delivery by the said Messrs. *M. N. & Co.* of the said 1,200 tons of coals under their said contract, and the time for delivery has long since elapsed ; but the said Messrs. *M.N. & Co.* never delivered the same, or any part thereof, but have always refused to do so, whereby the consideration for the defendants' acceptance has wholly failed.

5. The plaintiffs first received the said bill, and it was first indorsed to them after it was overdue.

6. The plaintiffs never gave any value or consideration for the said bill.

7. The plaintiffs took the said bill with notice of the facts stated in the second, third, and fourth paragraphs hereof.

[*Title.*]

Reply.

1. The plaintiff joins issue upon the defendants' statement of defence.

2. The plaintiff gave value and consideration for the said bill in manner following, that is to say, on the _____ day of _____, 187 _____, the said Messrs. *M.N. & Co.* were indebted to the plaintiff in about £ _____, the balance of an account for goods sold from time to time by him to them. On that day they ordered of the plaintiff further goods to the value of about £ _____, which last-mentioned goods have since

been delivered by him to them. And at the time of the order for such last-mentioned goods it was agreed between Messrs. *M.N. & Co.* and the plaintiff, and the order was received upon the terms, that they should indorse and hand over to him the bill of exchange sued upon, together with various other securities on account of the said previous balance, and the price of the goods so ordered on that day. The said securities, including the bill sued upon, were thereupon on the same day indorsed and handed over to the plaintiff.

No. 7.

BILL OF EXCHANGE AND CONSIDERATION.

187 . B. No.

In the High Court of Justice,
Division.

Writ issued 3rd August, 1876.

Between *A.B.* and *C.D.* - - - - Plaintiffs,
and
E.F. and *G.H.* - - - - Defendants.

Statement of Claim.

1. The plaintiffs are merchants, factors, and commission agents, carrying on business in London.

2. The defendants are merchants and commission agents, carrying on business at Hong Kong.

3. For several years prior to the , 1875, the plaintiffs had been in the habit of consigning goods to the defendants for sale, as their agents, and the defendants had been in the habit of consigning goods to the plaintiffs for sale, as their agents; and each party always received the price of the goods sold by him for the other; and a balance was from time to time struck between the parties and paid.

On the of , the moneys so received by the defendants for the plaintiffs, and remaining in their names, largely exceeded the moneys received by the plaintiffs for the defendants, and a balance of £ was accordingly due to the plaintiffs from the defendants.

4. On or about the , 1875, the plaintiffs sent to the defendants a statement of the accounts between them, showing the said sum as the balance due to the plaintiffs from the defendants, and the defendants agreed to the said statement of accounts as correct, and to the said sum of £ as the balance due by them to the plaintiffs, and agreed to pay interest on such balance if time were given to them.

5. The defendants requested the plaintiffs to give them three months' time for payment of the said sum of £ , and the plaintiffs agreed to do so upon the defendants accepting the bills of exchange hereinafter mentioned.

6. The plaintiffs thereupon on the
drew two bills of exchange upon the defendants, one for £ and
the other for £ , both payable to the order of the plaintiffs three
months after date, and the defendants accepted the bills.

The said bills became due on the , 187 , and the
defendants have not paid the bills, or either of them, nor the said sum
of £

The plaintiffs claim :—

£ and interest to the date of judgment.

The plaintiffs propose that the action should be tried in London.

No. 8.

187 . B. No.

In the High Court of Justice,
Division.

Writ issued []

[THE "IDA."]*

Between *A.B.* and *C.D.* - - Plaintiffs,
and
E.F. and *G.H.* - - Defendants.

Statement of Claim.

[1. The "Ida" is a vessel of which no owner or part owner was,
at the time of the institution of this cause, domiciled in England or
Wales.]†

2. In the month of February 1873, Messrs. L. and Company, of
Alexandria, caused to be shipped 6,110 ardebs of cotton seed on board the
said vessel, then lying in Port Said (Egypt), and the then master of the
vessel received the same, to be carried from Port Said to Hull, upon the
terms of three bills of lading, signed by the master, and delivered to
Messrs. L. and Company.

3. The three bills of lading, being in form exactly similar to one
another, were and are, so far as is material to the present case, in the
words, letters, and figures following, that is to say :—

"Shipped in good order and well conditioned by L. & Co., Alexandria
"(Egypt) in and upon the good ship called the 'Ida,' whereof is
"master for the present voyage Ambrozio Chiapella, and now riding
"at anchor in the port of Port Said (Egypt) and bound for Hull,
"six thousand one hundred and ten ardebs cotton seed being

* In Admiralty action insert name of ship.

† A statement to this effect may be inserted if the action be under sect.
6 of the Admiralty Act, 1861.

“marked and numbered as in the margin, and are to be delivered
 “in the like good order and well-conditioned at the aforesaid Port
 “of Hull (the act of God, the Queen’s enemies, fire and all and
 “every other dangers and accidents of the seas, rivers, and naviga-
 “tion of whatever nature and kind soever, save risk of boats so far
 “as ships are liable thereto excepted), unto order or to assigns paying
 “freight for the said goods at the rate of (19s.) say nineteen
 “shillings sterling in full per ton of 20 cwt. delivered with £10
 “gratuity. Other conditions as per charter-party, dated London, 4th
 “October, 1872, with primage and average accustomed. In witness
 “whereof the master or purser of the said ship hath affirmed to three
 “bills of lading, all of this tenor and date, the one of which three
 “bills being accomplished the other two to stand void. Dated in
 “Port Said (Egypt) 6th February, 1873. 100 dunnage mats. Fifteen
 “Working days remain for discharging.”

4. The persons constituting the firm of Messrs. L. and Company are identical with the members of the plaintiffs’ firm.

5. The vessel sailed on her voyage to Hull, and duly arrived there on or about the 7th day of May, 1873.

6. The cotton seed was delivered to the plaintiffs, but not in as good order and condition as it was in when shipped at Port Said; but was delivered to the plaintiff greatly damaged.

7. The deterioration of the cotton seed was not occasioned by any of the perils or causes in the bills of lading excepted.

8. By reason of the premises the plaintiffs lost as great part of the value of the said cotton seed, and were put to a great expense in and about keeping, warehousing, and improving the condition of the said cotton seed, and in and about having the same surveyed.

The plaintiffs claim the following relief:

1. *l.* for damages, [*and the condemnation of the said vessel and the defendant and his bail in the same]:
2. Such further relief as the nature of the case requires.

[*Title.*]

Defence.

Statement of:

1. They deny the truth of the allegations contained in the sixth, seventh and eighth articles of the said Petition.

2. The deterioration, if any, to the cotton seed was occasioned by the character and quality of the cotton seed when shipped on board the “*Ida*,” and by the inherent qualities of the cotton seed, and by shipping water in a severe storm which occurred on the day of in latitude during the voyage, or by some or one of such causes.

* This may be inserted if the action be an Admiralty action *in rem*.

[Title.]

*Reply.**Reply.*

The plaintiffs join issue upon the statement of defence.

No. 9.

BOTTOMRY.

187 . B. No.

In the High Court of Justice,
Admiralty Division.

[Writ issued]

THE "ONWARD."

Between <i>A.B.</i> and <i>C.D.</i>	-	-	-	Plaintiffs,
		and		
<i>E.F.</i> and <i>G.H.</i>	-	-	-	Defendants.

Statement of Claim.

1. The "Onward," a ship of 933 tons register, or thereabouts, belonging to the United States of America, whilst on a voyage from Moulmein to Queenstown or Falmouth, for orders, and from thence to a port of discharge in the United Kingdom or on the Continent, between Bordeaux and Hamburg, both ports inclusive, laden with a cargo of teak timber, was compelled to put into Port Louis, in the island of Mauritius, in order to repair and refit.

2. The master of the "Onward," being without funds or credit at Port Louis, and being unable to pay the expense of the said repairs, and the necessary disbursements of the said ship at Port Louis, so as to enable the said ship to resume and prosecute her voyage, and after having communicated with his owners and with the owners and consignees of the cargo, was compelled to resort to a loan of 24,369 dollars on bottomry of the said ship, her cargo and freight, for the purpose of enabling him to pay the said expenses and disbursements, which sum Messrs. H. and Company, of Port Louis, at the request of the master by public advertisement, advanced to the said master at and after the rate of 128 dollars for every 100 dollars advanced, and accordingly the said master, by a bond of bottomry, dated the 13th of October, 1870, by him duly executed in consideration of the sum of 24,369 dollars, Mauritius currency, paid to him by the said Messrs. H. and Company, bound himself and the said ship and her cargo, namely about 940 tons of teak timber, and her freight, to pay unto Messrs. H. and Company, their assigns or order or indorsees, the said sum of 24,369 dollars with the aforesaid maritime premium thereon, within twenty days next after the arrival of the "Onward" at her port of discharge from the said intended voyage, the said payment to be made, both in capital and interest, in British sterling money, at and after the rate of 4s. for every dollar, with a condition, that in case the said ship and cargo

should be lost during her voyage from Port Louis to Queenstown or Falmouth, for orders, and thence to her port of discharge in the United Kingdom, or on the Continent between Bordeaux and Hamburg, both ports inclusive, then, that the said sum of 24,359 dollars, and maritime premium thereon, should not be recoverable.

3. The "Onward" subsequently proceeded on her voyage, and on the 7th of February, 1871, arrived with her cargo on board at the port of Liverpool, which was her port of discharge.

4. The bond was duly indorsed and assigned to the plaintiffs.

5. The ship has been sold by order of the Court, and the proceeds of the sale thereof have been brought into Court, and the freight has also been paid into Court.

6. The said sum of 24,369 dollars, with the maritime premium thereon, still remain (*sic*) due to the plaintiffs. By a decree made on the 10th of May, 1871, the Court pronounced for the validity of the bond, so far as regarded the ship and freight, and condemned the proceeds of the ship and freight in the amount due on the bond. The principal and premium still remain owing to the plaintiffs, and the proceeds of the said ship and her freight available for payment thereof are insufficient for such payment.

The plaintiffs claim:—

1. That the Court pronounce for the validity of the bond so far as regards the cargo:
2. That the Court condemn the defendants and their bail in so much of the amount due to the plaintiffs on the bond, for principal, maritime premium, and for interest, from the time when such principal and premium ought to have been paid, as the proceeds of the ship and freight available for payment of the bond shall be insufficient to satisfy, and in costs:
3. Such further relief as the nature of the case requires.

[*Title.*]

Defence.

The defendants say that the—

1. Several averments in the second article of the statement contained are respectively untrue, except the averment that the bottomry bond therein mentioned was given and executed.

3. The "Onward" proceeded on the voyage, in the first paragraph of the claim mentioned, under a charter-party made between the defendants and the owners of the vessel, who resided at New York. And the cargo, in the said paragraph mentioned, belonged to the defendants, and was shipped at Moulmein, by Messieurs T., F., and Company, of Moulmein, consigned to the defendants.

4. When the "Onward" put into Port Louis, the master placed his ship in the hands of Messieurs H. and Company, the persons in the second

paragraph of the claim mentioned, and the repairs and disbursements in the said second article mentioned were made, directed, and expended, under the orders, management, and on the credit of the said Messieurs H. and Company, who at the outset contemplated the necessity of securing themselves by the hypothecation of the ship, freight, and cargo.

5. The master of the "Onward" and Messieurs H. and Company did not communicate to the said shippers of the cargo, or to the defendants, who carried on business at Glasgow, as the master knew, the intention of hypothecating the ship, freight, and cargo, or the circumstances which might render such hypothecation advisable or necessary, but, on the contrary, without reasonable cause or excuse, abstained from so doing, although the comparatively small value of the ship and freight to be earned, rendered it all the more important that such communication should have been made.

6. A reasonable and proper time was not allowed to elapse between the advertisements for the bottomry loan and the acceptance of Messieurs H. and Company's offer to make such loan.

[*Title.*]

Reply.

1. The plaintiffs say that the defendants, since the 31st day of December, 1868, have been the only persons forming the firm of T., F., and Co., of Moulmein, mentioned in the third paragraph of the defence.

2. After the master of the "Onward" put into Port Louis as aforesaid, he employed Messieurs H. and Company, in the claim mentioned, as his agents, and, by his directions, they, by letter, communicated to the defendants' firms at Moulmein and Glasgow the circumstances of the ship's distress, and the estimated amount of her repairs.

3. The said Messieurs H. and Company, shortly after the said ship was put into their hands at Port Louis, offered the said master, in case he should require them to do so, to make the necessary advances for the ship's repairs, and to take his draft at 90 days' sight on Messrs. B. Brothers, of London, at the rate of 5 per cent. discount for the amount of the advances, together with a bottomry bond on ship, cargo, and freight, as collateral security, the bond to be void should the draft be accepted. The said master, and the said Messieurs H. and Company, by letter, communicated to the owners of the "Onward" the circumstances of the said ship's distress, and the aforesaid offer of the said Messieurs H. and Company, and the said master by his letter requested the said owners to give him their directions on the subject. The said owners shortly after receiving such letters, by letter communicated with the defendants at Glasgow, and forwarded to them copies of the said lastly-mentioned letters of the said master, and of the said Messieurs H. and Co.

4. The defendants' houses at Moulmein and Glasgow respectively

received the letters referred to in the second paragraph of this reply, in time to have communicated with the said master at Port Louis before the giving of the said bottomry bond.

5. The defendants received the said copies of letters referred to in paragraph 4 of this reply, in time for them to have communicated thereon with the said master at Port Louis before the giving of the said bond.

6. The defendants did not at any time answer the said communications of the said Messieurs H. and Company, or in any way communicate or attempt to communicate with the said master, or to direct him not to give, or to prevent him from giving the said bottomry bond on the said cargo.

7. The said bond was duly advertised for sale, and was subsequently, and after a proper interval had elapsed, sold by auction in the usual way. There were several bidders at the sale, and the said Messieurs H. and Company were the lowest bidders in premium, and the said bond was knocked down to them. The said bond was not advertised for until the said ship was ready for sea, and up to that time the master of the said ship had expected to hear from her owners, and had hoped to be put in funds, and had not finally determined to resort to bottomry of the said ship, or her cargo, or freight.

8. Save as herein appears, the plaintiffs deny the truth of the several allegations contained in the said Answer.

[*Note.—The facts stated in this reply should, in general, be introduced by amendment into the statement of claim.*]

[*Title.*]

Rejoinder.

The defendants join issue upon the plaintiffs' reply.

No. 10.

CHARTER PARTY

187 . B. No.

In the High Court of Justice,
Division.

Writ issued 3rd August, 1876.

Between *A.B.* and *C.D.* - - - - Plaintiffs,

and

E.F. and *G.H.* - - - - Defendants.

Statement of Claim.

1. The plaintiffs were, on the 1st August, 1874, the owners of the steamship "British Queen."

2. On the 1st August, 1874, the ship being then in Calcutta, a charter-party was there entered into between John Smith, the master, on behalf

of himself and the owners of the said ship, of the one part, and the defendants of the other part.

3. By the said charter-party it was agreed, amongst other things, that the defendants should be entitled to the whole carrying power of the said steamship for the period of four months certain, commencing from the said 1st August, 1874, upon a voyage or voyages between Calcutta and Mauritius and back; that the defendants should pay for such use of the said steamship to the plaintiffs' agents at Calcutta, monthly, the sum of £1,000; that the charter should terminate at Calcutta; and that if at the expiration of the said period of four months the said steamship should be upon a voyage, then the defendants should pay *pro ratâ* for the hire of the ship up to her arrival at Calcutta, and the complete discharge of her cargo there.

4. The "British Queen" made several voyages in pursuance of the said charter-party, and the first three monthly sums of £1,000 each were duly paid.

5. The period of four months expired on the 1st December, 1874, and at that time the steamship was on a voyage from Mauritius to Calcutta. She arrived at Calcutta on the 13th December, and the discharge of her cargo there was completed on the 16th December, 1874.

6. The plaintiffs' agents at Calcutta called upon the defendants to pay to them the fourth monthly sum of £1,000, and a sum of £500 for the hire of the steamship from the 1st to the 16th December, 1874, but the defendants have not paid any part of the said sums.

The plaintiffs claim—

The sum of £1,500, and interest upon £1,000, part thereof, from the 1st December, 1874, until judgment.

The plaintiffs propose that this action should be tried in London.

[*Title.*]

Statement of Defence.

1. By the charter-party sued upon it was expressly provided that if any accident should happen to, or any repairs should become necessary to, the engines or boilers of the said steamship, the time occupied in repairs should be deducted from the period of the said charter, and a proportionate reduction in the charter money should be made.

2. On the repairs became necessary to the engines and boilers of the steamship, and ten days were occupied in effecting such repairs.

3. On the an accident happened to the engines of the steamship at Mauritius, and two days were occupied in effecting the repairs necessary in consequence thereof.

4. The defendants are therefore entitled to a reduction in the charter money of £400.

Counter-claim.

By way of set-off and counter claim the defendants claim as follows:—

5. By the charter-party it was expressly provided that the charterers should furnish funds for the steamship's necessary disbursements, except in the port of Calcutta, without any commission or interest on any sum so advanced.

6. The defendants paid for the necessary disbursements of the ship in the port of Mauritius between the and the , 1874, sums amounting in all to £625. 14s. 6d.

7. The charter-party also contained an express warranty that the steamship was at the date thereof capable of steaming nine knots an hour on a consumption of 30 tons of coal a day, and it was further provided by the charter-party that the charterers should provide coal for the use of the said steamship.

8. The steamship was at the date of the charter-party only capable of steaming less than eight knots an hour, and that only on a consumption of more than 35 tons of coal a day.

9. In consequence of the matters mentioned in the last paragraph, the steamship finally arrived at Calcutta at least 15 days later, and remained under charter at least 15 days longer, than she would otherwise have done. She was also, during the whole period of the said charter, at sea for a much larger number of days than she would otherwise have been, and consumed a much larger quantity of coal on each of such days than she would otherwise have done, whereby the defendants were obliged to provide for the use of the steamship much larger quantities of coal than they would otherwise have been.

The defendants claim—

£ damages in respect of the matters stated in this set-off and counter-claim.

[Title.]

Reply.

1. The plaintiffs join issue upon the second, third, and fourth paragraphs of the defendants' statement of defence.

2. With respect to the alleged set-off stated in paragraph 6, the plaintiffs do not admit the correctness of the amount therein stated. And all sums advanced by them for disbursements were paid or allowed to them by the plaintiffs by deducting the amount thereof from the third monthly sum of £1,000, paid (subject to such deduction) to the plaintiffs' agents at Calcutta by the defendants on or about the 12th November, 1874.

3. With respect to the alleged breach of warranty and the alleged damages therefrom stated in the 7th, 8th, and 9th paragraphs, the plaintiffs say that the steamship was at the date of the charter-party capable of steaming nine knots an hour on a consumption of 30 tons of coal a day. If the steamship did not, during the said charter, steam more

than eight knots an hour, and that on a consumption of more than 35 tons a day, as alleged (which the plaintiffs do not admit), it was in consequence of the bad and unfit quality of the coals provided by the defendants for the ship's use.

[*Title.*]

Rejoinder.

The defendants join issue upon the plaintiffs' reply to their set-off and counter-claim.

No. 11.

COLLISION.

187 . B. No.

In the High Court of Justice,
Admiralty Division.

Writ issued []

THE "AMERICAN."

Between *A.B.* and *C.D.* - - - - - Plaintiffs,
and
E.F. and *G.H.* - - - - - Defendants.

Statement of Claim.

1. Shortly before 8 a.m. on the 9th of December 1874, the brigantine "*Katie*," of 194 tons register, of which the plaintiffs were owners, manned by a crew of eight hands all told, whilst on a voyage from Dublin to St. John's, Newfoundland, in ballast, was in latitude about 46° N., and longitude 40° 42' W., by account.

2. The wind at such time was about W. by S., a strong breeze, and the weather was clear, and the "*Katie*" was under double-reefed mainsail, reefed mainstaysail, middle staysail, lower topsail, reefed fore staysail, and jib, sailing full and by on the port tack, heading about N.W. $\frac{1}{2}$ N., and proceeding at the rate of about five knots and a half per hour.

3. At such time a steamship under steam and sail, which proved to be the screw steamship "*American*," was seen at the distance of three or four miles from the "*Katie*," broad on her port bow, and steering about E. or E. by S. The master of the "*Katie*" not having been able to take observations for several days, and her chronometer having run down, and the said master wishing to exchange longitudes with the "*American*," caused an ensign to be hoisted, and marked his longitude by account on a board, which he exhibited over the port side. The "*Katie*" was kept full and by, and the "*American*" approached rapidly, and attempted to pass ahead of the "*Katie*," and caused immediate danger of collision, and although thereupon the helm of the "*Katie*" was put hard a-port and her mainsheet let go, the "*American*" with her stem struck the "*Katie*"

on her port side, almost amidships, cutting her nearly in two, and the "Katie" sank almost immediately, her crew being saved by the steamer.

4. The "American" improperly neglected to keep clear of the "Katie."

5. The "American" improperly attempted to pass ahead of the "Katie."

6. The "American" improperly neglected to ease her engines, and improperly neglected to stop and reverse her engines in due time.

The plaintiff claims.—

1. That it may be declared that the plaintiffs are entitled to the damage proceeded for;
2. That the bail given by the defendants be condemned in such damage, and in costs;
3. That the accounts and vouchers relating to such damage be referred to the Registrar assisted by merchants to report the amount thereof;
4. Such further and other relief as the nature of the case may require.

[Title.]

Statement of Defence.

The defendants say as follows:—

1. The "American" is a screw steamship, of 1,368 tons register with engines of 200-horse power nominal, belonging to the port of Liverpool, and at the time of the occurrences hereinafter mentioned was manned by a crew of 40 hands all told, laden with a cargo of general merchandise, and bound from Port-au-Prince in the West Indies to Liverpool.

2. About 8.5 a.m. on the 28th of November 1874, the "American" was in latitude 46° N., longitude 38° 16' W., steering E. by S. true magnetic, making under all sail and steam about 12 knots an hour, the wind being about S.W. by S. true magnetic, blowing a strong breeze and the weather hazy, when a vessel, which afterwards proved to be the brigantine "Katie," was observed on the "American's" starboard bow about four miles distant, bearing about S.E. by E. true magnetic, close-hauled to the wind, and steering a course nearly parallel to that of the "American."

3. The "American" kept her course, and when the "Katie" was about three miles distant her ensign was observed by those on board the "American" run up to the main, and she was seen to have altered her course, and to be bearing down towards the "American." The "American's" ensign was afterwards run up, and her master, supposing that the "Katie" wanted to correct her longitude, or to speak the "American," continued on his course expecting that the "Katie," when she had got sufficiently close to speak or show her black board over her starboard side, would luff to the wind, and pass to windward of the "American."

4. The master of the "American" watched the "Katie" as she continued to approach the "American," and when she had approached as near as he deemed it prudent for her to come, he waved to her to luff, and shortly afterwards, on his observing her to be attempting to cross the bows of the "American," the helm of the latter was immediately put to starboard, and engines stopped and reversed full speed; but notwithstanding, the "American" with her stem came into collision with the port side of the "Katie," a little forward of the main rigging.

5. The "American's" engines were then stopped, and when the crew of the "Katie" had got on board of the "American," the latter's engines were reversed to get her clear of the "Katie," which sunk under the "American's" bows.

6. The "Katie" improperly approached too close to the "American."

7. Those on board the "Katie" improperly neglected to luff, and to pass to windward of the "American."

8. Those on board the "Katie" improperly attempted to cross the bows of the "American."

9. Those on board the "Katie" improperly ported her helm before the said collision.

10. Those on board the "Katie" improperly neglected to starboard her helm before the said collision.

[Title.]

Reply.

The plaintiffs join issue upon the defendants' statement of defence.

No. 12.

EQUIPMENT OF SHIP.

117

B. N.

In the High Court of Justice,
Admiralty Division.

Writ issued []

THE "TWO ELLENS."

Between *A.B.* and *C.D.* - - - Plaintiffs.

and

E.F. - - - - - Defendant.

Statement of Claim.

1. The said vessel was and is a British Colonial vessel, belonging to the Port of Digby, in Nova Scotia, of which no owner or part owner was at the time of the commencement of this action or is domiciled in England or Wales.

2. At the time of the commencement of this action the said vessel was under arrest of this Court.

3. About the month of February, 1868, the said vessel was lying in the Port of London, in need of repairs, and of being equipped and supplied with certain other necessaries.

4. By the order of Messrs. K. L., who were duly authorised, the plaintiffs equipped and repaired the said vessel as she needed, and provided the vessel with necessaries, and there is now due to the plaintiffs for such necessary repairing and equipping, and other necessaries, the sum of £305. 3s., together with interest thereon from the 19th day of February, 1868.

The plaintiffs claim :

1. Judgment for the said sum of £305. 3s., with such interest thereon as aforesaid until judgment :
2. The condemnation of the ship and the defendant and his bail therein and in the costs of this suit :
4. Such further relief as the nature of the case requires.

[Title.]

Statement of Defence.

1. By an instrument of mortgage, in the form and recorded as prescribed by the Merchant Shipping Act, 1854, bearing date the 9th of March, 1867, and executed by C. M., blacksmith., D. F., master mariner, and W. H., farmer, all of Weymouth, in the county of Digby, in Nova Scotia, the registered owners of 64/64ths parts or shares in the vessel, the said C. M., D. F., and W. H. mortgaged 64/64ths parts or shares in the vessel, of which the said D. F. was also master, to G. T., of Nova Scotia, in consideration of the sum of 5,000 dollars advanced by him to the said owners, and for the purpose of securing the repayment by them to him of the said sum with interest thereon.

2. By an instrument of transfer, dated the 16th of July, 1868, in the form prescribed by the said Act, and executed by G. T., in consideration of the sum of 5,000 dollars to G. T. paid by the defendant, G. T. transferred to the defendant the mortgage security.

3. The said sum of 5,000 dollars, with interest thereon, still remains due on the said security.

4. The vessel was not under the arrest of this Court at the time of the commencement of this action.

5. The vessel did not need to be equipped or repaired as in the fourth paragraph of the plaintiffs claim mentioned, and she did not at the time of the supply of the articles referred to in the said fourth paragraph as "necessaries" stand in need of such articles. On the contrary, the said vessel could have gone to sea and proceeded on and prosecuted her voyage without such equipments, repairs, and articles referred to as aforesaid, and such equipments, repairs, and other articles were done and effected and

supplied for the purpose of reclassing the said vessel, and not for any other purpose; and the claim of the plaintiffs is not a claim for necessities within the meaning of the Admiralty Court Act, 1861, s. 5.

6. The alleged necessities were not supplied on the credit of the said vessel, but upon the personal credit of J. B., who was the broker for the vessel, and upon the agreement that the plaintiffs were not to have recourse to the vessel.

7. The defendant did not, nor did G. T., in any way order, authorise, or become liable for, and neither of them is in any way liable in respect of the said alleged supplies or any part thereof, and the said vessel was at the time of the commencement of this action and she still is of a less value than the amount which, irrespective of the sums referred to in the next article of this Answer, is due to the defendant on the said mortgage security.

8. The defendant, in order to save the vessel from being sold by this Court at the instance of certain of her mariners having liens on the said vessel for their wages, has been compelled to pay the said wages, and he claims, if necessary, to be entitled to stand in the place of such mariners, or to add the amounts so paid by him for wages to the amount secured by the said mortgage, and to have priority in respect thereof over the claim of the plaintiffs.

[*Title.*]

Reply.

1. The plaintiffs admit that 64/64th shares in the said ship the "Two Ellens" were on or about the 9th day of March, 1867, mortgaged by the said C. M., D. F., and W. H., all of Weymouth, in the county of Digby, Nova Scotia, to the said G. T.

2. Save as afore-mentioned, all the several averments in the said Answer contained are respectively untrue.

3. If there was or is any such instrument of transfer as is mentioned in the second article of the said Answer, the same has never been registered according to the provisions of the Merchant Shipping Act, 1854.

4. The said G. T. has never been domiciled in or resided in the United Kingdom, and is now resident in Nova Scotia, and the registered owners of the said vessel in the first paragraph of the said Defence mentioned were always and are domiciled in Nova Scotia, and resident out of the United Kingdom.

[*Title.*]

Rejoinder.

The defendant joins issue upon the third and fourth paragraphs of the Reply.

No. 13.

FALSE IMPRISONMENT.

187 . B. No.

In the High Court of Justice,
Division.

Writ issued 3rd August, 1876.

Between *A.B.* - - - - - Plaintiff,

and

E.F. - - - - - Defendant.*Statement of Claim.*

1. The plaintiff is a journeyman painter. The defendant is a builder, having his building yard, and carrying on business at and for six months before and up to the 22nd August, 187 , the plaintiff was in the defendant's employment as a journeyman painter.

2. On the said 22nd August, 187 , the plaintiff came to work as usual in the defendant's yard, at about six o'clock in the morning.

3. A few minutes after the plaintiff had so come to work the defendant's foreman *X.Y.*, who was then in the yard, called the plaintiff to him, and accused the plaintiff of having on the previous day stolen a quantity of paint, the property of the defendant, from the yard. The plaintiff denied the charge, but *X.Y.* gave the plaintiff into the custody of a constable, whom he had previously sent for, upon a charge of stealing paint.

4. The defendant was present at the time when the plaintiff was given into custody, and authorised and assented to his being so given into custody; and in any case, *X.Y.*, in giving him into custody, was acting within the scope and in the course of his employment as the defendant's foreman, and for the purposes of the defendant's business.

5. The plaintiff upon being so given into custody, was taken by the said constable a considerable distance through various streets, on foot, to the police station, and he was there detained in a cell till late in the same afternoon, when he was taken to the police court, and the charge against him was heard before the magistrate then sitting there, and was dismissed.

6. In consequence of being so given into custody, the plaintiff suffered annoyance and disgrace, and loss of time and wages, and loss of credit and reputation, and was thereby unable to obtain any employment or earn any wages for three months.

The plaintiff claims £ damages.

The plaintiff proposes that this action should be tried in Middlesex.

[*Title.*]*Statement of Defence.*

1. The defendant denies that he was present at the time when the plaintiff was given into custody, or that he in any way authorised or

assented to his being given into custody. And the said X.Y., in giving the plaintiff into custody, did not act within the scope or in the course of his employment as the defendant's foreman, or for the purposes of the defendant's business.

2. At some time about five or six o'clock on the _____ being the evening before the plaintiff was given into custody, a large quantity of paint had been feloniously stolen by some person or persons from a shed upon the defendant's yard and premises.

3. At about 5.30 o'clock on the evening of the _____ the plaintiff, who had left work about half an hour previously, was seen coming out of the shed when no one else was in it, although his work lay in a distant part of the yard from and he had no business in or near the shed. He was then seen to go to the back of a stack of timber in another part of the yard. Shortly afterwards the paint was found to have been stolen, and it was found concealed at the back of the stack of timber behind which the plaintiff had been seen to go.

4. On the following morning, before the plaintiff was given into custody, he was asked by X.Y. what he had been in the shed and behind the stack of timber for, and he denied having been in either place. X.Y. had reasonable and probable cause for suspecting, and did suspect that the plaintiff was the person who had stolen the paint, and thereupon gave him into custody.

[Title.]

Reply.

The plaintiff joins issue upon the defendant's statement of defence.

No. 14.

FORECLOSURE.

1876. W. No. 672.

In the High Court of Justice,
Chancery Division.

[Name of Judge.]

Writ issued []

Between R. W. - - - - Plaintiff,

and

O. and J. B. - - - - Defendants.

Statement of Claim.

1. By an indenture dated the 25th of March, 1876, made between the defendant O. S. of the one part, and the plaintiff of the other part, the defendant O. S., in consideration of the sum of £10,000 paid to him by the plaintiff, conveyed to the plaintiff and his heirs a farm containing 398 acres, situate in the parish of B., in the county of D., with all the coal mines, seams of coal, and other mines and minerals in and under

the same, subject to a proviso for a redemption of the same premises on payment by the defendant O. S., his heirs, executors, administrators, or assigns, to the plaintiff, his executors, administrators, or assigns, of the sum of £10,000, with interest for the same in the meantime at the rate of £4 per cent. per annum, on the 25th day of September then next.

2. By an indenture dated the 1st day of April, 1867, made between the defendant O. S. of the one part, and the defendant J. B. of the other part, the defendant O. S. conveyed to the defendant J. B. and his heirs the hereditaments comprised in the hereinbefore stated security of the plaintiff, or some parts thereof, subject to the plaintiff's said security, and subject to a proviso for redemption of the same premises on payment by the defendant O. S., his heirs, executors, administrators, or assigns, to the defendant J. B., his executors, administrators, or assigns, of the sum of £15,000, with interest for the same in the meantime at the rate of £5 per cent. per annum.

3. The whole of the said sum of £10,000, with an arrear of interest thereon, remains due to the plaintiff on his said security.

The plaintiff claims as follows:—

1. That an account may be taken of what is due to the plaintiff for principal money and interest on his said security, and that the defendants may be decreed to pay to the plaintiff what shall be found due to him on taking such account, together with his costs of this action, by a day to be appointed by the court, the plaintiff being ready and willing, and hereby offering, upon being paid the principal money, interest, and costs, at such appointed time, to convey the said mortgaged premises as the court shall direct.
2. That in default of such payment the defendants may be foreclosed of the equity of redemption in the mortgaged premises.
3. Such further or other relief as the nature of the case may require.

1876. W. 672.

In the High Court of Justice,

Chancery Division.

[Name of Judge.]

Between R. W.	-	-	-	-	-	Plaintiff,
					and	
O. S. and J. B.	-	-	-	-	-	Defendants.
					(by original action,)	
and between the said O. S.	-	-	-	-	-	Plaintiff,
					and	
The said R. W. and J. B., and J. W.	-	-	-	-	-	Defendants.
					(by counter-claim.)	

The Defence and Counter-claim of the above-named O. S.

1. This defendant does not admit that the contents of the indenture of

the 25th day of March, 1867, in the plaintiff's statement of complaint mentioned, are correctly stated therein.

2. The indenture of the 1st day of April, 1867, in the statement of claim mentioned, was not a security for the sum of £15,000, and interest at £5 per cent. per annum, but for the sum of £14,000 only, with interest at the rate of £4. 10s. per cent. per annum.

3. This defendant submits that under the circumstances in his counter-claim mentioned, the said indentures of the 25th day of March, 1867, and the 1st day of April, 1867, did not create any effectual security upon the mines and minerals in and under the lands in the same indentures comprised, and that the same mines and minerals ought to be treated as excepted out of the said securities.

And by way of counter-claim this defendant states as follows:—

1. At the time of the execution of the indenture next hereinafter stated, J. C. A. was seized in fee simple in possession of the lands described in the said indentures, and the mines and minerals in and under the same.
2. By indenture dated the 24th of March, 1860, made between the said J. C. A. of the first part, E. his wife, then E. S., spinster, of the second part, and this defendant and the above-named J. W. of the third part, being a settlement made in contemplation of the marriage, shortly after solemnised, between the said J. C. A. and his said wife, the said J. C. A. granted to this defendant and the said J. W., and their heirs, all the coal mines, beds of coal, and other the mines and minerals under the said lands, with such powers and privileges as in the now-stated indenture mentioned, for the purpose of winning, working, and getting the same mines and minerals, to hold the same premises to this defendant and the said J. W. and their heirs to the use of the said J. C. A., his heirs and assigns, till the solemnization of the said marriage, and after the solemnization thereof to the use of this defendant and the said J. W., their executors and administrators, for the term of 500 years, from the day of the date of the now stating indenture, upon the trusts therein mentioned, being trusts for the benefit of the said J. C. A., and his wife and the children of their marriage, and from and after the expiration or other determination of the said term of 500 years, and in the meantime subject thereto, to the use of the said J. C. A., his heirs and assigns for ever.
3. By indenture dated the 12th of May, 1860, made between the said J. C. A. of the one part, and W. N. of the other part, the said J. C. A. granted to the said W. N. and his heirs the said lands, except the coal mines, beds of coal, and other mines and minerals thereunder, to hold the same premises unto and to the use of the

- said W. N., his heirs and assigns for ever, by way of mortgage, for securing the payment to the said W. N., his executors, administrators, or assigns, of the sum of £26,000 with interest as mentioned.
4. On the 14th of January, 1864, the said J. A. C. was adjudicated a bankrupt, and shortly afterwards J. L. was appointed creditors assignee of his estate.
 5. Some time after the said bankruptcy, the said W. N., under a power of sale in his said mortgage deed, contracted with this defendant for the absolute sale to this defendant of the property comprised in his said security for an estate in fee simple in possession, free from incumbrances, for the sum of £26,000, and the said J. L., as such assignee as aforesaid, agreed to join in the conveyance to this defendant for the purpose of signifying his assent to such sale.
 6. By indenture dated the 1st of September, 1866, made between the said W. N. of the first part, the said J. L. of the second part, the said J. C. A. of the third part, and this defendant of the fourth part, reciting the said agreement for sale, and reciting that the said J. L. being satisfied that the said sum of £26,000 was a proper price, had with the sanction of the Court of Bankruptcy, agreed to confirm the said sale, it was witnessed that in consideration of the sum of £26,000, with the privity and approbation of the said J. L., paid by this defendant to the said W. N., he the said W. N. granted, and the said J. C. A. ratified and confirmed to this defendant and his heirs, all the hereditaments comprised in the said security of the 12th day of May 1860, with their rights, members, and appurtenances, and all the estate, right, title, and interest of them, the said W. N. and J. C. A. therein, to hold the same premises unto and to the use of this defendant, his heirs, and assigns for ever.
 7. The sale to this defendant was not intended to include anything not included in the security of the 12th of May, 1860, and the said J. L. only concurred therein to signify his approval of the said sale, and did not purport to convey any estate vested in him; and the lastly hereinbefore stated indenture did not vest in this defendant any estate in the said mines and minerals.
 8. The plaintiff and the defendant J. B. respectively had before they advanced to this defendant the moneys lent by them on their securities in the plaintiff's claim mentioned, full notice that the mines and minerals under the said lands did not belong to this defendant. This fact appeared on the abstracts of title delivered to them before the preparation of their said securities. A valuation of the property made by a surveyor was furnished to them respectively on behalf of this defendant before they agreed to advance

their money on their securities; but although the said lands are in a mineral district, the mines and minerals were omitted from such valuation, and they respectively knew at the time of taking their said securities that the same did not include any interest in the mines and minerals.

9. At the time when the securities of the plaintiff and the defendant J. B. were respectively executed, the plaintiff and the defendant J. B. respectively had notice of the said indenture of settlement of the 24th day of March, 1860.
10. At the time when the plaintiff's security was executed, the mines and minerals under the said lands, with such powers and privileges as aforesaid, were vested in this defendant and the said J. W. for the residue of the said term of 500 years, and subject to the said term, the inheritance in the same mines, minerals, powers and privileges was vested in the said J. L. as such assignee as aforesaid.
11. The said security to the plaintiff was by mistake framed so as to purport to include the mines and minerals amongst the said lands, and by virtue thereof the legal estate in moiety of the said mines and minerals became and now is vested in the plaintiff for the residue of the said term of 500 years.

The defendant O. S. claims as follows:

1. That it may be declared that neither the plaintiff nor the defendant J. B. has any charge or lien upon that one undivided moiety, which in manner aforesaid became vested in the plaintiff for the residue of the said term of 500 years, of and in the mines and minerals in and under the lands mentioned in the plaintiff's said security.
 2. That it may be declared that the said mines and minerals, rights, and privileges which by the said indenture of settlement were vested in the defendant O. S. and the said J. W. for the said term of 500 years, upon trust as therein mentioned, ought to be so conveyed and assured as that the same may become vested in the defendant O. S. and the said J. W. for all the residue of the said term upon the trusts of the said settlement.
 3. That the said R. W. and J. W. may be decreed to execute all such assurances as may be necessary for giving effect to the declaration secondly hereinbefore prayed.
 4. To have such further or other relief as the nature of the case may require.
-

1876 W. 672.

In the High Court of Justice,
Chancery Division.

[Name of Judge.]

Between R. W. - - - - - Plaintiff,
and
O. S. and J. B. - - - - - Defendants,
(by original action)
And between the said O. S. - - - - - Plaintiff,
and
The said R. W., and J. B., and J. W. - Defendants.
(by counter-claim.)

The Reply of the Plaintiff R. W.

1. The plaintiff joins issue with the defendants upon their several defences, and in reply to the statements alleged by the defendant O. S., by way of counter-claim, the plaintiff says as follows:

1. The plaintiff does not admit the execution of any such indenture as is stated in the said counter-claim to bear date the 24th of March, 1860.
2. The plaintiff does not admit that the indenture of the 12th of May, 1860, is stated correctly in the statement of claim.
3. When the defendant O. S., in the year 1866, applied to the plaintiff to advance him the sum of £10,000, he offered to the plaintiff as a security the lands which were afterwards comprised in the indenture of the 25th of March, 1867, including the mines and minerals which he now alleges were not to form part of the security, and the plaintiff agreed to lend the said sum upon the security of the said lands, including such mines and minerals. During the negotiation for the said loan a valuation of the property to be included in the mortgage was delivered to the plaintiff on behalf of the said defendant. Such valuation included the mines and minerals; and the plaintiff consented to make the loan on the faith of such valuation. The plaintiff did not know when he took his security that it did not include any interest in the said mines and minerals; on the contrary, he believed that the entirety of such mines and minerals was to be included therein.
4. The plaintiff does not admit the contents of the indenture of the 1st of September, 1866, to be as alleged, or that it was so framed as not to include the said mines and minerals, or that it was not intended to include anything not included in the security of the 12th of May, 1860, or that J. L. in the counter-claim named only concurred therein to signify his approval of the said sale, and did not purport to convey any estate vested in him.

- No. 15.
FRAUD.

187 , B. No.

Writ issued 3rd August, 1876.

Between *A.B.* - - - - - Plaintiff,
E.F. - - - - - and
- - - - - Defendant.

Statement of Claim.

1. In or about March, 1875, the defendant caused to be inserted in the "Daily Telegraph" Newspaper an advertisement, in which he offered for sale the lease, fixtures, fittings, goodwill, and stock-in-trade of a baker's shop and business, and described the same as an increasing business, and doing twelve sacks a week. The advertisement directed application for particulars to be made to X.Y.

2. The plaintiff having seen the advertisement applied to X.Y., who placed him in communication with the defendant, and negotiations ensued between the plaintiff and the defendant for the sale to the plaintiff of the defendant's bakery at _____ with the lease, fixtures, fittings, stock-in-trade, and goodwill.

3. In the course of these negotiations the defendant repeatedly stated to the plaintiff that the business was a steadily increasing business, and that it was a business of more than twelve sacks a week.

4. On the 5th of April, 1875, the plaintiff, believing the said statements of the defendant to be true, agreed to purchase the said premises from the defendant for £500, and paid to him a deposit of £200 in respect of the purchase.

5. On the 15th April the purchase was completed, an assignment of the lease executed, and the balance of the purchase-money paid. On the same day the plaintiff entered into possession.

6. The plaintiff soon afterwards discovered that at the time of the negotiations for the said purchase by him and of the said agreement, and of the completion thereof, the said business was and had long been a declining business; and at each of those times, and for a long time before, it had never been a business of more than eight sacks a week. And the said premises were not of the value of £500, or of any saleable value whatever.

7. The defendant made the false representations hereinbefore mentioned, well knowing them to be false, and fraudulently, with the intention of inducing the plaintiff to make the said purchase on the faith of them.

The plaintiff claims £ damages.

[*Title.*]

Statement of Defence.

1. The defendant says that at the time when he made the representations mentioned in the third paragraph of the statement of claim and throughout the whole of the transactions between the plaintiff and defendant, and down to the completion of the purchase and the relinquishment by the defendant of the said shop and business to the plaintiff, the said business was an increasing business, and was a business of over twelve sacks a week. And the defendant denies the allegations of the 6th paragraph of the statement of claim.

2. The defendant repeatedly during the negotiations told the plaintiff that he must not act upon any statement or representation of his, but must ascertain for himself the extent and value of the said business. And the defendant handed to the plaintiff for this purpose the whole of his books, showing fully and truthfully all the details of the said business and from which the nature, extent, and value thereof could be fully seen, and those books were examined for that purpose by the plaintiff, and by an accountant on his behalf. And the plaintiff made the purchase in reliance upon his own judgment, and the result of his own inquiries and investigations, and not upon any statement or representation whatever of the defendant.

[Title.]

Reply.

The plaintiff joins issue upon the defendant's statement of defence.

No. 16.

GUARANTEE.

In the High Court of Justice,
Division.

187 . B. No.

Writ issued 3rd August, 1876.

Between *A.B.* and *C.D.* - - - - - Plaintiffs,

and

E.F. and *G.H.* - - - - - Defendants.

Statement of Claim.

1. The plaintiffs are brewers, carrying on their business at under the firm of *X. Y. & Co.*
2. In the month of March, 1872, *M.N.* was desirous of entering into the employment of the plaintiffs as a traveller and collector, and it was agreed between the plaintiffs and the defendants *M.N.*, that the plaintiffs should employ *M.N.* upon the defendant entering into the guarantee hereinafter mentioned.
3. An agreement in writing was accordingly made and entered into, on or about the 30th March, 1872, between the plaintiffs and the defendant, whereby in consideration that the plaintiffs would employ *M.N.* as their collector the defendant agreed that he would be answerable for the due accounting by *M.N.* to the plaintiffs for and the due payment over by him to the plaintiffs of all moneys which he should receive on their behalf as their collector.
4. The plaintiffs employed *M.N.* as their collector accordingly, and he entered upon the duties of such employment, and continued therein down to the 31st of December, 1873.
5. At various times between the 29th of September and the 25th of December, 1873, *M.N.* received on behalf of the plaintiffs and as their collector sums of money from debtors of the plaintiffs amounting in the whole to the sum of £950; and of this amount *M.N.* neglected to account for or pay over to the plaintiffs sums amounting in the whole to £227, and appropriated the last mentioned sums to his own use.
6. The defendant has not paid the last-mentioned sums, or any part thereof to the plaintiffs.

The plaintiffs claim:—

No. 17.

INTEREST SUIT, PROBATE.

In the High Court of Justice,
Probate Division.

187 . B. No.

Between *A.B.* - - - - - Plaintiff.

and

C.D. - - - - - Defendant.

Statement of Claim.

1. *M.N.*, late of No. High Street, Putney, in the County of Surrey, grocer, deceased, died on or about the day of at No. 1, High Street, Putney, aforesaid, a widower, without child, parent, brother or sister, uncle or aunt, nephew or niece.

2. The plaintiff is the cousin-german, and one of the next of kin of the deceased.

The plaintiff claims:—

That the court decree to him a grant of letters of administration of the personal estate and effects of the said deceased as his lawful cousin-german, and one of his next of kin.

[*Title.*]

Defence.

1. The defendant admits that *M.N.* died a widower, without child, parent, brother or sister, uncle or aunt, or niece, but he denies that he died without nephew.

2. The deceased had a brother named *G.B.*, who died in his lifetime.

3. *G.B.* was married to *E.H.* in the parish church of in the county of on the day of and had issue of such marriage, the defendant, who was born in the month of and is the nephew and next of kin of the deceased.

The defendant therefore claims:—

That the court pronounce that he is the nephew and next of kin of the deceased, and as such entitled to a grant of letters of administration of the personal estate and effects of the deceased.

[*Title.*]

Reply.

1. The plaintiff denies that *G.B.* was married to *E.H.*

2. He also denies that the defendant is the issue of such marriage.

No. 18.

LANDLORD AND TENANT.

187. B. No.

In the High Court of Justice,
Division.

Writ issued 3rd August, 1876.

Between <i>A.B.</i>	-	-	-	-	-	-	Plaintiff,
							and
<i>C.D.</i>	-	-	-	-	-	-	Defendant.

Statement of Claim.

1. On the day of the plaintiff, by deed, let to the defendant a house and premises, No. 52, Street, in the city of

London, for a term of 21 years, from the day of , at the yearly rent of 120*l.*, payable quarterly.

2. By the said deed, the defendant covenanted to keep the said house and premises in good and tenantable repair.

3. The said deed also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved, whether demanded or not, should be in arrear for 21 days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the 24th June, 187 , a quarter's rent became due, and on the 29th of September, 187 , another quarter's rent became due; on the 21st October, 187 , both had been in arrear for 21 days, and both are still due.

5. On the same 21st of October, 187 , the house and premises were not, and are not now in good or tenantable repair, and it would require the expenditure of a large sum of money to reinstate the same in good and tenantable repair, and the plaintiff's reversion is much depreciated in value.

The plaintiff claims :—

1. Possession of the said house and premises.
2. £ for arrears of rent.
3. £ damages for the defendant's breach of his covenant repair.
4. £ for the occupation of the house and premises, from the 29th of September, 187 , to the day of recovering possession.

The plaintiff proposes that this action should be tried in London.

No. 19.

NECESSARIES FOR SHIP.

187 . B. No.

In the High Court of Justice,
Admiralty Division.

Writ issued [].

THE "ENTERPRISE."

Between <i>A.B.</i> and <i>C.D.</i>	-	-	-	-	Plaintiffs,
and					
<i>E.F.</i> and <i>G.H.</i>	-	-	-	-	Defendants.

Statement of Claim.

1. The plaintiffs were at the time hereinafter stated, and are engineers and ironfounders, carrying on business at Liverpool, in the county of Lancaster.

2. In the month of January, 1872, whilst the above-named steamship, "Enterprise," belonging to the port of London, was in the port of Liver-

pool, the plaintiffs, having received orders from the master in that behalf, executed certain necessary work to her, and supplied her with certain necessary stores and materials, and caused her to be supplied upon their credit with certain necessary work, labour, materials, and necessaries, and thereby supplied the said ship with necessaries within the meaning of the fifth section of the Admiralty Court Act, 1861.

3. There is due to the plaintiffs in respect of such supply of necessaries to the said ship the sum of £577. 2s. 6d., and the plaintiffs cannot obtain payment thereof without the assistance of the Court.

The plaintiffs claim:—

1. Judgment pronouncing for the claim of the plaintiffs:
2. The condemnation of the defendants, and their bail therein, with costs:
3. A reference, if necessary, of the claim of the plaintiffs to the registrar, assisted by assessors, to report the amount thereof:
4. Such further relief as the nature of the case requires.

[*Title.*]

Defence.

1. The defendants deny the allegations contained in the third paragraph of the statement of claim.

2. The defendants admit that the plaintiffs executed certain work to the said ship, and supplied her with certain materials, but they say that a portion of the work so executed was executed badly and insufficiently, and of the materials so supplied, some were bad and insufficient, and a portion of the work in the claim mentioned was done in and about altering and endeavouring to make good such bad and insufficient work and materials. The defendant has paid in respect of the work and materials in the claim mentioned the sum of £356. 17s. 9d., and the said sum is sufficient to satisfy the claims of the plaintiffs.

3. The defendants deny the allegations contained in the second paragraph of the claim so far as they relate to any claim beyond the said sum of £356. 17s. 9d., and say that if the plaintiffs did execute any work or did supply any materials other than the work and materials mentioned in the second paragraph of this defence such work was not necessary work; and such materials were not necessary materials, within the meaning of the fifth section of the Admiralty Court Act, 1861, and were not supplied in such circumstances as to render the defendants liable to pay for the same.

[*Title.*]

Reply.

1. The defendants join issue upon the statement of defence,
-

No. 20.

NEGLIGENCE.

In the High Court of Justice,
Division.

187 B. No

Writ issued 3rd August, 1876.

Between *A.B.* - - - Plaintiff,
and
E.F. - - - Defendant.

Statement of Claim.

1. The plaintiff is a shoemaker, carrying on business at
The defendant is a soap and candle manufacturer, of

2. On the 23rd May, 1875, the plaintiff was walking eastward along the south side of Fleet Street, in the city of London, about three o'clock in the afternoon. He was obliged to cross Street, which is a street running into Fleet Street at right angles on the south side. While he was crossing this street, and just before he could reach the foot pavement on the further side thereof, a two-horse van of the defendant's, under the charge and control of the defendant's servants, was negligently, suddenly, and without any warning, turned at a rapid and dangerous pace out of Fleet Street into Street. The pole of the van struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken, and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

The plaintiff claims £ damages.

[Title.]

Statement of Defence.

1. The defendant denies that the van was the defendant's van, or that it was under the charge and control of the defendant's servant. The van belonged to Mr. John Smith, of , a carman and contractor employed by the defendant to carry and deliver goods for him; and the persons under whose charge and control the said van was were the servants of the said Mr. John Smith.

2. The defendant does not admit that the van was turned out of Fleet Street, either negligently, suddenly, or without warning, or at a rapid or dangerous pace.

3. The defendant says, that the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the van approaching him, and avoided any collision with it.

[Title.]

The plaintiff joins issue upon the defendant's statement of defence.

POSSESSION OF SHIP.

187 . B. No.

Writ issued [].

Between A.B. - - - Plaintiff,
 and
E.F. - - Defendant.

1. On or about the 15th of July, 1868, an agreement was entered into between the plaintiff and J. D., who was then the sole owner of the above-named barque "Lady of the Lake," whereby J. D. agreed to sell, and the plaintiff agreed to purchase, 32-64th parts or shares of the vessel for the sum of £500 ; payment £300 in cash, and the remainder by purchaser's acceptances at three and six months date, and it was thereby agreed that the plaintiff was to be commander of the vessel.

2. The plaintiff accordingly paid to J. D. the sum of £300, and gave him his (the plaintiff's) acceptances, at three and six months' date for the residue of the said purchase-money, and J. D. by bill of sale transferred 32-64th parts or shares in the vessel to the plaintiff, which bill of sale was duly registered on the 18th of July, 1868; the plaintiff has since been and still is the registered owner of such 32-64th shares.

3. The vessel then sailed under the plaintiff's command on a voyage from Sunderland to the Brazils and other ports, and then on a homeward voyage to Liverpool, where she arrived on the 18th of June, 1869, and having there discharged her homeward cargo, she sailed thence under the plaintiff's command with a cargo to the Tyne, and thence to Sunderland, at which port she arrived on the 9th of August, 1869.

4. The plaintiff then made several ineffectual applications to J. D. with a view to obtaining another charter for the said vessel, and after she had been lying idle for a considerable time, the plaintiff on or about the 16th of September, 1869, obtained an advantageous charter for her to proceed to Barcelona with a cargo of coals, and with a view to enabling her to execute such charter the plaintiff paid the dock dues, and moved

the vessel into a slipway in order that her bottom might be cleaned, but on or about the 17th of September, whilst the vessel was on the shore adjoining the slipway, the defendant, to whom the said J. D. had in the meantime transferred his 32-64th parts, forcibly took the vessel out of the possession of the plaintiff, and refused and still refuses to allow the plaintiff to take the vessel on her said voyage to Barcelona, and by reason thereof heavy loss is being occasioned to the plaintiff.

The plaintiff claims :—

1. Judgment giving possession of the vessel "Lady of the Lake" to the plaintiff :
2. The condemnation of the defendant in costs of suit, and in all losses and damages occasioned by the defendant to the plaintiff :
3. Such further relief as the nature of the case requires.

[*Title.*]

Defence.

1. The defendants say that the acceptances in the second paragraph of the claim mentioned were respectively dishonoured by the plaintiff, and have never yet been paid by him.

2. It was agreed between the plaintiff and J. D., that J. D. should act, and he has since always acted, as ship's husband of the "Lady of the Lake."

3. On the 31st of August, 1869, J. D. sold to the defendant, for the sum of £400, and by bill of sale duly executed, transferred to him his 32.64th shares, and the bill of sale was duly registered on the 14th of September following.

4. After the "Lady of the Lake" had arrived at Sunderland, and after the defendant had purchased from J. D. his 32-64th shares of the "Lady of the Lake," the defendant placed the vessel in the custody and possession of a shipkeeper. The plaintiff, however, unlawfully removed her from such possession, and thereupon the defendant had the vessel taken into the South Dock of the harbour at Sunderland, with orders that she should be kept there. What the defendant did, as in this article mentioned, he did with the consent and full approval of J. D.

5. At the time of the sale of the "Lady of the Lake" by J. D. to the defendant as afore-mentioned, there was and there still is due from the plaintiff, as part owner of the "Lady of the Lake," to J. D. as part owner and ship's husband, a sum of money exceeding £300 in respect of the vessel and her voyages over and above the amount of the unpaid acceptances.

6. Save as herein appears, the averments in the fourth paragraph of the claim contained are untrue, and if the charter party mentioned in that paragraph was obtained by the plaintiff as alleged, which the defendant

does not admit, it was obtained by him without the authority, consent, or knowledge of J. D. or the defendant.

7. Before the defendant took possession of the vessel as aforementioned, the plaintiff ceased to be master of her, with the consent of J. D. or the defendant.

8. J. D. has instituted an action against the said vessel in order to have the accounts taken between him and the plaintiff, and to enforce payment of the money due from the plaintiff to him.

[Title.]

Reply.

1. The plaintiffs say in reply to the first paragraph of the defence that the bills therein mentioned were dishonoured by the plaintiff because J. D. was indebted to the plaintiff in a large amount for his wages as master, and for his share of the earnings of the "Lady of the Lake," and refused payment thereof.

2. J. D. did not place the vessel in the exclusive custody or possession of a shipkeeper as in the fifth paragraph of the defence stated or implied. On the contrary, the vessel continued in the custody and possession of the plaintiff, who still holds her register. A man was sent on board the vessel by J. D. to look after J. D.'s share in the said vessel while she was in dock, but he did not dispossess the said plaintiff or take exclusive possession of the vessel, and the plaintiff was not dispossessed of the vessel until on or about the 17th of September last.

3. Except as hereinbefore appears the plaintiff joins issue upon the defendant's statement of defence.

[Title.]

Rejoinder.

The defendant joins issue upon the first and second paragraphs of the Reply.

—
No. 22.

PROMISSORY NOTE.

187 . B. No.

In the High Court of Justice,
Division.

Writ issued 3rd August, 1876.

Between A.B.	-	-	-	-	Plaintiff,
				and	
E.F.	-	-	-	-	Defendant.

Statement of Claim.

1. The defendant on the day of made his

promissory note, whereby he promised to pay to the plaintiff or his order
£ three months after date.

2. The note became due on the day of 1874
and the defendant has not paid it.

The plaintiff claims :—

The amount of the note and interest thereon to judgment.

The plaintiff proposes that this action should be tried in the county of

[*Title.*]

Statement of Defence.

1. The defendant made the note sued upon under the following circumstances :—The plaintiff and defendant had for some years been in partnership as coal merchants, and it had been agreed between them that they should dissolve partnership, that the plaintiff should retire from the business, that the defendant should take over the whole of the partnership assets and liabilities, and should pay the plaintiff the value of his share in the assets after deducting the liabilities.

2. The plaintiff thereupon undertook to examine the partnership books, and inquire into the state of the partnership assets and liabilities ; and he did accordingly examine the books, and make the said inquiries, and he thereupon represented to the defendant that the assets of the firm exceeded £10,000, and that the liabilities of the firm were under £3,000, whereas the fact was that the assets of the firm were less than £5,000, and the liabilities of the firm largely exceeded the assets.

3. The misrepresentations mentioned in the last paragraph induced the defendant to make the note now sued on, and there never was any other consideration for the making of the note.

[*Title.*]

Reply.

The plaintiff joins issue on the defence.

No. 23.

PROBATE OF WILL IN SOLEMN FORM.

187 . B. No.

In the High Court of Justice,
Probate Division.

Writ issued []

Between <i>A.B.</i>	-	-	-	-	Plaintiff,
					and
<i>E.F.</i>	-	-	-	-	Defendant.

Statement of Claim.

1. T. C., late of Bicester in the county of Oxford, gentleman,

deceased, who died on the 20th of January, 1875, at Bicester, being of the age of 21 years, made his last will with one codicil thereto, the said will bearing date the first day of October, 1874, and the said codicil the first of January, 1875, and in the said will appointed the plaintiff sole executor thereof.

2. The said will and codicil were signed by the deceased [*or, by X.Y. in the presence and by the directions of the deceased, or signed by the deceased, who acknowledged his signature, or as the case may be*] in the presence of two witnesses present at the same time, the said will in the presence of H. P. and J. R., and the said codicil in the presence of J. D. and G. E., and who subscribed the same in the presence of the said deceased.

3. The deceased was at the time of the execution of the said will and codicil respectively of sound mind, memory, and understanding.

The plaintiff claims:—

That the Court shall decree probate of the said will and codicil in solemn form of law.

[*Title.*]

Statement of Defence.

The defendant says as follows:—

1. The said will and codicil of the said deceased were not duly executed according to the provisions of the statute 1 Vict. c. 26.

2. The deceased at the time the said will and codicil respectively purport to have been executed was not of sound mind, memory, and understanding.

3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him, whose names are at present unknown to the defendant].

4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant's present knowledge being [*state the nature of the fraud.*]

5. The said deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof, or of the contents of the residuary clause in the said will [*as the case may be.*]

6. The deceased made his true last will, dated the 1st day of January, 1873, and in the said will appointed the defendant sole executor thereof. [*Propound this will as in paragraphs 2 and 3 of claim.*]

The defendant claims:—

1. That the Court will pronounce against the said will and codicil propounded by the plaintiff:

2. That the Court will decree probate of the said will of the said deceased, dated the 1st of January. 1873. in solemn form of law.

[Title]

Reply.

1. The plaintiff joins issue upon the statement of defence of the defendant, as contained in the first, second, third, fourth, and fifth paragraphs hereof.

2. The plaintiff says that the said will of the said deceased, dated the 1st of January, 1873, was duly revoked by the will of the said 1st of October, 1873, propounded by the plaintiff in his statement of claim.

A.D. 1875.

No. 24.

RECOVERY OF LAND.—LANDLORD AND TENANT.

187 . . B. No.

In the High Court of Justice,

Common Pleas Division.

Writ issued 3rd August, 1876.

Between A.B. - - - - Plaintiff,
and

C.D. - - - - Defendant.

Statement of Claim.

1. On the day of the plaintiff let to the defendant a house, No. 52, street, in the city of London, as tenant from year to year, at the yearly rent of £120, payable quarterly, the tenancy to commence on the day of .

2. The defendant took possession of the house and continued tenant thereof until the day of last, when the tenancy determined by a notice duly given.

3. The defendant has disregarded the notice and still retains possession of the house.

The plaintiff claims:—

1. Possession of the house.

2. £ for mesne profits from the day of

The plaintiff proposes that this action should be tried in London.

In the High Court of Justice,

187 . . No.

Common Pleas Division.

Between A.B. - - - - Plaintiff,
and

C.D. - - - - Defendant,
(by original action,)

And between C.D. - - - - Plaintiff,
and

A.B. - - - - Defendant,
(by counter claim.)

The defence and counter claim of the above-named C.D.

1. Before the determination of the tenancy mentioned in the statement

of claim, the plaintiff *A.B.*, by writing, dated the _____ day of _____, and signed by him, agreed to grant to the defendant *C.D.* a lease of the house mentioned in the statement of claim, at the yearly rent of £150, for the term of 21 years, commencing from the _____ day of _____, when the defendant *C.D.*'s tenancy from year to year determined, and the defendant has since that date been and still is in possession of the house under the said agreement.

2. By way of counter claim the defendant claims to have the agreement specifically performed and to have a lease granted to him accordingly, and for the purpose aforesaid, to have this action transferred to the Chancery division.

In the High Court of Justice, _____ 187 . No.
Chancery Division.

(Transferred by order dated _____ day of _____.)

Between *A.B.* - - - - - Plaintiff,

and

C.D. - - - - - Defendant,

(by original action,)

And between *C.D.* - - - - - Plaintiff,

and

A.B. - - - - - Defendant,

(by counter claim.)

The reply of the plaintiff *A.B.*

The plaintiff *A.B.* admits the agreement stated in the defendant *C.D.*'s statement of defence, but he refuses to grant to the defendant a lease, saying that such agreement provided that the lease should contain a covenant by the defendant to keep the house in good repair and a power of re-entry by the plaintiff upon breach of such covenant, and the plaintiff says that the defendant has not kept the house in good repair, and the same is now in a dilapidated condition.

[Title.]

Joinder of Issue.

The defendant *C.D.* joins issue upon the plaintiff *A.B.*'s statement in reply.

No. 25.

RECOVERY OF LAND.

187 . B. No.

In the High Court of Justice,
Common Pleas Division.

Writ issued 3rd August, 1876.

Between *A.B.* and *C.D.* - - - - - Plaintiffs,

and

E.F. - - - - - Defendants.

Statement of Claim.

1. *K. L.*, late of Sevenoaks, in the county of Kent, duly executed his last will, dated the 4th day of April, 1870, and thereby devised his lands at or near Sevenoaks, and all other his lands in the county of Kent, unto and to the use of the plaintiffs and their heirs, upon the trusts therein mentioned for the benefit of his daughters Margaret and Martha, and appointed the plaintiffs executors thereof.

2. *K. L.* died on the 3rd day of January, 1875, and his said will was proved by the plaintiffs in the Court of Probate on or about the 4th day of February, 1875.

3. *K. L.* was at the time of his death seised in fee of a house at Sevenoaks, and two farms near there called respectively _____, the home farm containing 276 acres, and the Longton farm containing 700 acres, both in the county of Kent.

4. The defendant, soon after the death of *K. L.*, entered into possession of the house and two farms, and has refused to give them up to the plaintiff.

The plaintiffs claim:—

1. Possession of the house and two farms:

2. £ _____ for mesne profits of the premises from the death of *K. L.* till such possession shall be given.

The plaintiff proposes that this action should be tried in the county of Kent.

[Title.]

Statement of Defence.

1. The defendant is the eldest son of *I. L.*, deceased, who was the eldest son of *K. L.*, in the statement of claim named.

2. By articles bearing date the 31st day of May, 1827, and made previous to the marriage of *K. L.* with Martha his intended wife, *K. L.*, in consideration of such intended marriage, agreed to settle the house and two farms in the statement of claim mentioned (and of which he was then seised in fee) to the use of himself for his life, with remainder to the use of his intended wife for her life, and after the survivor's decease, to the use of the heirs of the body of the said *K. L.* on his wife begotten, with other remainders over.

3. The marriage soon after took effect, *K. L.*, by deeds of lease and release, bearing date respectively the 4th and 5th of April, 1828, after reciting the articles in alleged performance of them, conveyed the house and two farms to the use of himself for his life, with remainder to the use of his wife for her life, and after the decease of the survivor of them, to the use of the heirs body of *K. L.* on the said Martha to be begotten with other remainders over.

4. There was issue of the marriage an only son Thomas L and two daughters. After the death of Thomas L , which took place in February, 1864, *K.L.*, on the 3rd May, 1864, executed a disentailing assurance, which was duly enrolled and thereby conveyed the house and two farms to the use of himself in fee.

[*Title.*]

Reply.

The plaintiffs join issue upon the defendant's statement of defence.

No. 26.

SALVAGE.

In the High Court of Justice,
Admiralty Division.

Writ issued [].

THE "CAMPANIL."

Between <i>A.B.</i> and <i>C.D.</i>	-	-	-	-	Plaintiffs,
					and
<i>E.F.</i> and <i>G.H.</i>	-	-	-	-	Defendants.

Statement of Claim.

1. The "Brazilian" is a screw steamer belonging to the port of Newcastle, of the burthen of 1,359 tons gross registered tonnage, and propelled by engines of 130 horse-power, and at the time of the rendering of the salvage services hereinafter mentioned she was navigated by her master and a crew of twenty-four hands. She left the Port of Newcastle on the 27th of November, 1873, on a voyage to Genoa, and thence by way of Palmaras and Aguilas to the Tyne, and about 10 a.m. on the 26th of December, 1873, in the course of her homeward voyage, with a cargo of merchandise, she was off the coast of Portugal, the Island of Ons bearing about S.E. by E., when those on board her sighted a disabled steamer about four points on their starboard bow, inshore, flying signals of distress. A strong gale was blowing at the time, and there was a very heavy sea running.

2. The "Brazilian" at once made towards the disabled steamer, which proved to be the "Campanil," the vessel proceeded against in this action. She was heavily laden with a cargo of iron ore. The "Brazilian" as she approached the "Campanil" signalled to her, and the "Campanil" answered by signal that her engines had broken down. By this time the "Campanil" was heading in shore, rolling heavily, and shipping a large quantity of water. The "Brazilian" came under the lee of the "Campanil" and asked if she wanted assistance. Her master replied that he wanted to be towed to Vigo as his vessel had lost her screw. The master of the "Brazilian" then asked those on board the "Campanil"

to send him a hawser, and for a long time those on board the "Brazilian" made attempts to get a hawser from the "Campanil," and exposed themselves and their vessel to great danger in doing so. The wind and sea rendering it impossible to get the hawser whilst the "Brazilian" was to leeward of the "Campanil," the "Brazilian" went to windward and attempted to float lines by means of life buoys to the "Campanil." During all this time the "Campanil" was quite unmanageable, and yawed about, and there was very great difficulty in manœuvring the "Brazilian" so as to retain command over her and keep her near the "Campanil." It was necessary to keep constantly altering the engines of the "Brazilian," setting them on ahead and reversing them quickly, and in consequence the engines laboured heavily and were exposed to great danger of being strained.

3. Whilst the "Brazilian" was endeavouring to float lines to the "Campanil," the "Campanil" made a sudden lurch and struck the "Brazilian" on her port quarter, knocking in her port bulwark and rail, and causing other damage to the vessel. After many unsuccessful efforts by those on board the "Brazilian," and after they had lost two life buoys and a quantity of rope, a hawser from the "Campanil" was at length made fast on board the "Brazilian," and the "Brazilian" with the "Campanil" in tow steamed easy ahead. A second hawser was then got out and made fast with coir springs, and the "Brazilian" then commenced to tow full speed ahead, each hawser having a full scope of 90 fathoms.

4. The "Brazilian" made towards Vigo, which was about 35 miles distant, the vessels made about two knots an hour, the "Brazilian" keeping her engines going at full speed. The "Brazilian" laboured very heavily, and both vessels shipped large quantities of water.

5. About noon one of the tow ropes broke, and both vessels were in danger of being driven ashore, broken water and rocks appearing to leeward, distant about two miles. After great difficulty the broken hawser was made fast again with a heavy spring of a number of parts of rope, and the "Brazilian" towed ahead under the lee of Ons Island.

6. Shortly afterwards the weather moderated and the sea went down a little, and the "Brazilian" was able to make more way, and about 7 p.m. the same day she towed the "Campanil" into Vigo harbour in safety.

7. The "Brazilian" was compelled to remain in harbour the next day to pay port charges and clear at the Custom House.

8. The coast off which the aforesaid services were rendered is rocky and exceedingly dangerous, and strong currents set along it, and but for the services rendered by the "Brazilian" the "Campanil" must have gone ashore and been wholly lost, together with her cargo, and in all

probability her master and crew would have been drowned. No other steamer was in sight, and there was not any prospect of any other efficient assistance.

9. In rendering the said services the "Brazilian" and those on board her were exposed to great danger. Owing to the heavy sea, and the necessity of towing with a long scope of hawser, there was great danger of fouling the screw of the "Brazilian," and it required constant vigilance on the part of the master and crew to prevent serious accident. The master and crew of the "Brazilian" underwent much extra fatigue and exertion.

10. The damage sustained by the "Brazilian" in rendering the said services amounts to the sum of £150, and the value of the extra quantity of coal consumed in consequence of the said services is estimated at £16 and £4 1s. 5d. was paid by the owners of the "Brazilian" for harbour dues and other charges at Vigo.

11. The value of the "Campanil," her cargo and freight, at the time of the salvage services were as follows, that is to say: The "Campanil" was of the value of £13,000, her cargo was of the value of £300, and the gross amount of freight payable upon delivery of the cargo laden on board her at Barrow-in-Furness was £675.

12. The value of the "Brazilian," her freight and cargo was about £25,050.

The plaintiffs claim:—

1. Such an amount of salvage as to the Court may seem just :
2. That the defendants and their bail be condemned in costs :
3. Such further or other relief as the nature of the case may require.

[*Title.*]

Statement of Defence.

1. The defendants say that upon the 22nd of December, 1873, the iron screw steamship "Campanil," of the burden of 660 tons register gross, propelled by engines of 70 horse-power, navigated by David Boughton, her master, and a crew of 16 hands, left Porman, bound to Barrow-in-Furness, laden with a cargo of iron ore.

2. At about 8 a.m. of the 26th of December, whilst the "Campanil" was prosecuting her voyage, the shaft of her propeller broke outside the stern tube, and she lost her propeller. The "Campanil" was then brought to the wind, which was south by east, blowing fresh, and she proceeded under sail for Vigo, and continued to do so until about 9.30 a.m., when two steamships which had been for some time in sight, and coming to the northward, approached the "Campanil." The ensign of the "Campanil" was hoisted, union up, as a signal to one of such steamships, which afterwards came to the "Campanil," and proved to be the "Brazilian," whose owners, master, and crew are the plaintiffs.

Statement of Claim.

1. The plaintiff was, on the 5th March, 1876, and still is, the owner and occupier of a farm called Highfield Farm, in the parish of and county of

2. A private road, known as Highfield Lane, runs through a portion of the plaintiff's farm. It is bounded upon both sides by fields of the plaintiff's, and is separated therefrom by a hedge and ditch.

3. For a long time prior to the 5th March, 1876, the defendant had wrongfully claimed to use the said road for his horses and carriages on the alleged ground that the same was a public highway, and the plaintiff had frequently warned him that the same was not a public highway, but the plaintiff's private road, and that the defendant must not so use it.

4. On the 5th March, 1876, the defendant came with a cart and horse, and a large number of servants and workmen, and forcibly used the road, and broke down and removed a gate which the plaintiff had caused to be placed across the same.

5. The defendant and his servants and workmen on the same occasion pulled down and damaged the plaintiff's hedge and ditch upon each side of the road, and went upon the plaintiff's field beyond the hedge and ditch, and injured the crops there growing, and dug up and injured the soil of the road; and in any case the acts mentioned in this paragraph were wholly unnecessary for the assertion of the defendant's alleged right to use, or the user of the said road as a highway.

The plaintiff claims :

1. Damages for the wrongs complained of.
2. An injunction restraining the defendant from any repetition of any of the acts complained of.
3. Such further relief as the nature of the case may require.

[*Title.*]

Statement of Defence.

1. The defendant says that the road was and is a public highway for horses and carriages; and a few days before the 5th March, 1876, the plaintiff wrongfully erected the gate across the road for the purpose of obstructing and preventing, and it did obstruct and prevent the use of the road as a highway. And the defendant, on the said 5th March, 1876, caused the said gate to be removed, in order to enable him lawfully to use the road by his horses and carriages as a highway.

2. The defendant denies the allegations of the fifth paragraph of the statement of claim, and says that neither he nor any of his workmen or servants did any act, or used any violence other than was necessary to enable the plaintiff lawfully to use the highway.

[*Title.*]*Reply.*

The plaintiff joins issue upon the defendant's statement of defence.

No. 28.

Form of Demurrer.

In the High Court of Justice,
Division.

A. B. v. C. D.

The defendant [plaintiff] demurs to the [plaintiff's statement of complaint *or* defendant's statement of defence *or* of set-off, *or* of counter-claim], [*or* to so much of the plaintiff's statement of complaint as claims *or* as alleges as a breach of contract the matters mentioned in paragraph 17, *or* as the case may be], and says that the same is bad in law on the ground that [*here state a ground of demurrer*] and on other grounds, sufficient in law to sustain this demurrer.

This is Form No. 1 of Schedule (C) to the Rules of Court drawn up in 1874 under the principal Act.

This form is intended to illustrate Order XXVIII., Rule 2, of the present Act, p. 392, *supra*.

No. 29.

Memorandum of Entry of Demurrer for Argument.

1874. B.No.

In the High Court of Justice,
Division.

A. B. v. C. D.

Enter for the argument the demurrer of
to

X. Y.,

Solicitor for the plaintiff [*or, &c.*]

This is form No. 2 of Schedule (C) to the Rules of Court drawn up in 1874 under the principal Act.

This form is intended to illustrate Order XXVIII., Rule 13 of the present Act, p. 379, *supra*.

APPENDIX D.

This Appendix is new. It illustrates Order XLI., Rule 1, of the present Act, p. 462, *supra*.

FORMS OF JUDGMENT.

1. *Default of Appearance and Defence in case of Liquidated Demand.*
(See pp. 325 and 398.)

1876. B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,
and
C.D. and *E.F.* - - - - - Defendants.

30th November, 1876.

The defendants [or the defendant *C.D.*] not having appeared to the writ of summons herein [or not having delivered any statement of defence], it is this day adjudged that the plaintiff recover against the said defendant £ , and costs, to be taxed.

2. *Judgment in default of appearance in Action for Recovery of Land.*
(See pp. 319 and 400.)

[Title, &c.]

30th November, 1876.

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover possession of the land in the said writ mentioned.

3. *Judgment in default of Appearance and Defence after Assessment of Damages.* (See pp. 328 and 398.)

1876. B. No.

In the High Court of Justice,
Division.

Between *A.B.* and *C.D.* - - - - - Plaintiffs,
and
E.F. and *G.H.* - - - - - Defendants.

30th November, 1876.

The defendants not having appeared to the writ of summons herein [or not having delivered a statement of defence] and a writ of inquiry dated 1876, having been issued directed to the sheriff of to assess the damages which the plaintiff was entitled to recover, and the said sheriff having by his return dated the 1876, returned that the said damages have been assessed at £ , it is adjudged that the plaintiff recover £ , and costs to be taxed.

4. *Judgment of Trial by Judge without a Jury.* (See pp. 432 and 444.)

[Year, letter, and number.]

Division.

day of

18

[*If in Chancery Division, name of Judge.*]

Between *A.B.* - - - Plaintiff,
and
C.D., E.F., and G.H. - Defendants.

This action coming on for trial [the day of
and] this day, before in the presence of counsel for the
plaintiff and the defendants [*or, if some of the defendants do not appear, for*
the plaintiff and the defendant C.D., no one appearing for the defendants
E.F. and G.H., although they were duly served with notice of trial as by
the affidavit of filed the day of appears,] upon
hearing the probate of the will of , the answers of the defendants
C.D., E.F., and G.H., to interrogatories, the admission in writing, dated
and signed by [Mr. the solicitor for] the plaintiff
A.B. and by [Mr. the solicitor for] the defendant C.D., the
affidavit of filed the day of , the
affidavit of filed the day of , the
evidence of taken on their oral examination at
the trial, and an exhibit marked X., being an indenture dated, &c., and
made between [parties], and what was alleged by counsel on both sides
This court doth declare, &c.

And this court doth order and adjudge, &c.

5. *Judgment after Trial by a Jury.* (See pp. 442 and 465.)

[*Title, &c.*]

15th November, 1876.

The action having on the 12th and 13th November, 1876, been tried
before the Honourable Mr. Justice and a special jury
of the county of , and the jury having found [*state findings*
as in officer's certificate], and the said Mr. Justice having ordered
that judgment be entered for the plaintiff for £ and costs of suit [*or*
as the case may be.] Therefore it is adjudged that the plaintiff recover
against the defendant £ and £ for his costs of suit [*or that*
the plaintiff recover nothing against the defendant, and that the defendant
recover against the plaintiff £ for his costs of defence, or as the
case may be].

6. *Judgment after Trial before Referee.* (See pp. 120 and 132.)

[*Title, &c.*]

30th November, 1876.

The action on the 27th November, 1876, been tried before *X.Y. Esq.*
an official [*or special*] referee; and the said *X.Y.* having found [*state*
substance of referee's certificate], it is this day adjudged that.

7. *Judgment upon Motion for Judgment.* (See p. 456).

[Title, &c.]

30th November, 1876.

This day before Mr. X. of counsel for the plaintiff [*or as the case may be*], moved on behalf of the said [state judgment moved for], and the said Mr. X. having been heard of counsel for and Mr. X. of counsel for the Court adjudged

APPENDIX E.

This Appendix is new. It illustrates Order XLII, Rule 10, of the present Act, p. 471, *supra*. (See note to that Rule.)

FORMS OF PRÆCIPÉ.

1. *Fieri facias.*

1876. B. No.

In the High Court of Justice,

Division.

Between *A.B.* - - - - - Plaintiff,

and

C.D. and others - - - - - Defendants.

Seal a writ of fieri facias directed to the sheriff of to
levy against *C.D.* the sum of £ and interest
thereon at the rate of £ per centum per annum from the
day of [and £ costs] to .

Judgment [*or order*] dated day of
[Taxing master's certificate, dated day of
X.Y., solicitor for [*party on whose behalf writ is to issue.*]

2. *Elegit.*

187 . B. No.

In the High Court of Justice,

Division.

Between *A.B.* - - - - - Plaintiff,

and

C.D. and others - - - - - Defendants.

Seal a writ of elegit directed to the sheriff of
against of in the county of
for not paying to *A.B.* the sum of £ , together with interest
thereon, from the day of [and the sum of

£ for costs,] with interest thereon at the rate of £4 per centum per annum.

Judgment [*or order*] dated day of 18
[Taxing master's certificate, dated day of 18 .]

X.Y.,

Solicitor for

3. *Venditioni Exponas.*

187 . B. No.

In the High Court of Justice,

Division.

Between *A.B.* - - - - - - - Plaintiff,

C.D. and others - - - - - - - Defendants.

Seal a writ of venditioni exponas directed to the sheriff of
to sell the goods and of *C.D.* taken under a writ of fieri
facias in this action tested day of .

X.Y.,

Solicitor for

4. *Fieri Facias de Bonis Ecclesiasticis.*

In the High Court of Justice,

187 . B. No.

Division.

Between *A.B.* - - - - - - - Plaintiff,

and

C.D. - - - - - - - Defendant.

Seal a writ of fieri facias de bonis ecclesiasticis directed to the bishop
[*or archbishop as the case may be*] of to levy against *C.D.*
the sum of £ .

Judgment [*or order*] dated day of .
[Taxing master's certificate, dated day of].

X.Y.,

Solicitor for

5. *Sequestrari Facias de Bonis Ecclesiasticis.*

187 . B. No.

In the High Court of Justice,

Division.

Between *A.B.* - - - - - - - Plaintiff,

and

C.D. and others - - - - - - - Defendants.

Seal a writ of sequestrari facias directed to the Lord Bishop of
against *C.D.* for not paying to *A.B.* the sum of £

6. *Writ of Sequestration.*

187 . B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,
and
C.D. and others - - - - - Defendants.

Seal a writ of sequestration against *C.D.* for not
at the suit of *A.B.* directed to [*names of Commissioners*].
Order dated _____ day of _____ .

7. *Writ of Possession.*

187 . B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,
and
C.D. and others - - - - - Defendants.

Seal a writ of possession directed to the sheriff of _____ to
deliver possession to *A.B.* of _____ .
Judgment dated _____ day of _____ .

8. *Writ of Delivery.*

187 . B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,
and
C.D. and others - - - - - Defendants.

Seal a writ of delivery directed to the sheriff of _____ to make
delivery to *A.B.* of _____ .

9. *Writ of Attachment.*

187 . B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,
and
C.D. and others - - - - - Defendants.

Seal in pursuance of order dated _____ day of _____
an attachment directed to the sheriff of _____ against *C.D.* for not
delivering to *A.B.*

APPENDIX F.

This Appendix is new. It illustrates Order XLII, Rule 12, of the present Act, p. 472, *supra*.

FORMS OF WRITS.

1. *Writ of Fieri Facias*.

187 . B. No.

In the High Court of Justice,

Division.

Between *A.B.* - - - - - Plaintiff,

and

C.D. and others - - - - - Defendants.

Victoria, by the of grace God of the United Kingdom of Great and Ireland Queen, Defender of the Faith,

To the sheriff of greeting,

We command you that of the goods and chattels of *C.D.* in your bailiwick you cause to be made the sum of £ , and also interest thereon at the rate of £ per centum per annum from the day of * which said sum of money and interest were lately before us in our High Court of Justice in a certain action [*or certain actions, as the case may be*] wherein *A.B.* is plaintiff and *C.D.* and others are defendants [*or in a certain matter there depending intituled "In the matter of E.F." as the case may be*] by a judgment [*or order as the case may be*] of our said Court, bearing date the day of adjudged [*or ordered, as the case may be*] to be paid by the said *C.D.* to *A.B.*, together with certain costs in the said judgment, [*or order as the case may be*] mentioned, and which costs have been taxed and allowed by one of the taxing masters of our said Court at the sum of £ as appears by the certificate of the said taxing master, dated the day of And that of the goods and chattels of the said *C.D.* in your bailiwick you further cause to be made the said sum of £ [costs] together with interest thereon at the rate of £4 per centum per annum from the day of †, and that you have that money and interest before us in our said Court immediately after the execution hereof to be paid so the said *A.B.* in pursuance of the said judgment [*or order, as the case may be.*] And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution thereof. And have here then this writ.

Witness, &c.

* Day of the judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be.

† The date of the certificate of taxation. The writ *must* be so moulded as to follow the substance of the judgment or order.

See Order XLII, Rules 1, 6, and 15 of the present Act, pp. 466, 468 and 475, *supra*; Order XLIII, Rule, 1, p. 470.

Form of Writs of *fi. fa.* will be found in the Schedule to Reg. Gen. Hil. T. 1853, Nos. 1 to 8.

2. *Writ of Elegit.*

187 . B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,
and

C.D. and others - - - - - Defendants,

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To the sheriff of , greeting.

Whereas lately in our High Court of Justice in a certain action [or certain actions, *as the case may be*] there depending, wherein *A.B.* is plaintiff and *C.D.* and others are defendants [or in a certain matter there depending, intituled "*In the matter of E.F.*," *as the case may be*] by a judgment [or order, *as the case may be*] of our said Court, made in the said action [or matter, *as the case may be*], and bearing date the day of , it was adjudged [or ordered, *as the case may be*] that

C.D. should pay unto *A.B.* the sum of £ , together with interest thereon after the rate of £ per centum per annum from the day of , together also with certain costs as in the said judgment [or order, *as the case may be*] mentioned, and which costs have been taxed and allowed by one of the taxing masters of our said Court, at the sum of £ , as appears by the certificate of the said taxing-master, dated the day of .

And afterwards the said *A.B.* came into our said Court, and according to the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C.D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick as the said *C.D.*, or any one in trust for him, was seised or possessed of on the day of , in the year of our Lord * or at any time afterwards, or over which the said *C.D.* on the said day of , or at any time afterwards had any disposing power which he might without the assent of any other person exercise for his own benefit to hold to him the said goods and chattels as his proper goods and chattels.

* The day on which the judgment or order was made.

and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof to him and to his assigns, until the said two several sums of £ and £ , together with interest upon the said sum of £ at the rate of £ per centum per annum from the said day of and on the said sum of £ (costs) at the rate of £4 per centum per annum from the day of shall have been levied. Therefore we command you that without delay you cause to be delivered to the said *A.B.* by a reasonable price and extent all the goods and chattels of the said *C.D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick as the said *C.D.*, or any person or persons in trust for him was or were seised or possessed of on the said day of * or at any time afterwards or over which the said *C.D.* on the said day of *, or at any time afterwards had any disposing power which he might without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said *A.B.*, as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof to him and to his assigns until the said two several sums of £ and £ together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us in our Court aforesaid, immediately after the execution thereof, under your seals, and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness ourselves at Westminster, &c.

See Order XLII, Rules 6 & 15 of the present Act, pp. 468 and 473, *supra*; Order XLIII, Rule 1, p. 479.

Various forms of writs of *elegit* will be found in the schedule to the Reg. Gen. Hil. T. 1853, Nos. 9, 10, 11, 12, 13 & 14.

Writ of Venditioni Exponas.

1875. B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,
and

C.D. and others - - - - - Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

* The day on which the decree or order was made.

To the sheriff of

greeting :

Whereas by our writ we lately commanded you that of the goods and chattels of *C.D.* [*here recite the fieri facias to the end*]. And on the day of you returned to us in the

Division of our High Court of Justice aforesaid, that by virtue of the said writ to you directed you had taken goods and chattels of the said *C.D.* to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers. Therefore we being desirous that the said *A.B.* should be satisfied his money and interest aforesaid command you that you expose to sale and sell, or cause to be sold, the goods and chattels of the said *C.D.*, by you in form aforesaid taken, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before us in our said Court of Justice immediately after the execution hereof, to be paid to the said *A.B.* And have there then this writ.

Witness ourself at Westminster, the day of
in the year of our reign.

See Order XLIII, Rule 2, of the present Act, p. 481, *supra*.

4. *Writ of Fieri facias de Bonis Ecclesiasticis.*

1875. B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,
and

C.D. and others - - - - - Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the Right Reverend Father in God [*John*] by divine permission Lord Bishop of greeting: We command you, that of the ecclesiastical goods of *C.D.*, clerk in your diocese, you cause to be made £ which lately before us in our High Court of Justice in a certain action [*or certain actions, as the case may be*] wherein *A.B.* is plaintiff and *C.D.* is defendant [*or in a certain matter there depending, intituled "In the matter of E.F."* as the case may be], by a judgment [*or order, as the case may be*] of our said Court bearing date the day of , was adjudged [*or ordered, as the case may be*] to be paid by the said *C.D.* to the said *A.B.*, together with interest on the said sum of at the rate of £ per centum per annum, from the day of and have that money, together with such interest as aforesaid before us in our said Court immediately after the execution hereof, to be rendered to the said *A.B.*, for that our sheriff of

returned to us in our said Court on [or "at a day now past"] that the said *C.D.* had not any goods or chattels or any lay fee in his bailiwick whereof he could cause to be made the said £ and interest aforesaid or any part thereof, and that the said *C.D.* was a beneficed clerk (to wit) rector of the rectory [or vicar of the vicarage] and parish church of , in the said sheriff's county, and within your diocese [as in the return], and in what manner you shall have executed, this our writ make appear to us in our said Court immediately after the execution hereof, and have you there then this writ. Witness ourself at Westminster, the day of in the year of our Lord

See Order XLIII, Rule 2, of the present Act, p. 481, *supra*, and from No. 5 of this Appended.

5. *Writ of Fieri Facias to the Archbishop de bonis Ecclesiasticis during the vacancy of a Bishop's See.*

Victoria [&c. as in the preceding form]: To the Right Reverend Father in God [John] by Divine Providence Lord Archbishop of Canterbury, Primate of all England and Metropolitan, greeting: We command you, that of the ecclesiastical goods of *C.D.*, clerk in the diocese of which is within the province of Canterbury, as ordinary of that church the episcopal see of now being vacant, you cause to be made [&c., conclude as in the preceding form].

See Order XLIII, Rule 2, of the present Act, p. 481, *supra*, and from No. 4 of this Appendix.

6. *Writ of Sequestrari Facias de bonis Ecclesiasticis.*

1875. B. No.

In the High Court of Justice,

Division.

Between *A.B.* - - - Plaintiff,
and
C.D. and others - - - Defendants.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; To the Right Reverend Father in God [John] by Divine permission Lord Bishop of greeting: Whereas we lately commanded our sheriff of that he should omit not, by reason of any liberty of his county, but that he should enter the same, and cause [to be made, if after the return to a *feri facias*, or delivered, if after the return to an *elegit*, &c., and in either case recite the former writ.] And whereupon our said sheriff of on [or "at a day past"] returned to us in the division of our said court of justice, that the said *C.D.* was a beneficed clerk; that is to say rector of the rectory [or vicar of the vicarage] and parish church

of _____ in the county of _____, and within your diocese, and that he had not any goods or chattels, or any lay fee in his bailiwick [*here follow the words of the sheriff's return.*] Therefore we command you that you enter into the said rectory [*or vicarage*] and parish church of _____, and take and sequester the same into your possession, and that you hold the same in your possession until you shall have levied the said £ _____ and interest aforesaid, of the rents, tithes, rentcharges in lieu of tithes, oblations, obventions, fruits, issues, and profits thereof, and other ecclesiastical goods in your diocese of and belonging to the said rectory [*or vicarage*] and parish church of _____ and to the said *C.D.* as rector [*or vicar*] thereof to be rendered to the said *A.B.*, and what you shall do therein make appear to us in our said court immediately after the execution hereof, and have you there then this writ. Witness ourself at Westminster the _____ day of _____ in the year of our Lord

See Order XLIII, Rule 2 of the present Act, p. 481, *supra*.

7. *Writ of Possession.*

187 . B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiffs,
and
C.D. and others - - - - - Defendants.

Victoria, _____ to the sheriff of _____, greeting :
Whereas lately in our High Court of Justice, by a judgment of the division of the same court [*A.B.* recovered] or [*E.F.* was ordered to deliver to *A.B.*] possession of all that _____ with the appurtenances in your bailiwick: Therefore, we command you that you omit not by reason of any liberty of your county, but that you enter the same, and without delay you cause the said *A.B.* to have possession of the said land and premises with the appurtenances. And in what manner you have executed this our writ make appear to the Judges of the _____ division of our High Court of Justice immediately after the execution hereof, and have you there then this writ. Witness, &c.

See Order XLII, Rule 3, of the present Act, p. 467, *supra*, and Order XLVIII, p. 492, *supra*.

8. *Writ of Delivery.*

187 . B. No.

In the High Court of Justice,
Division.

Between *A.B.* - - - - - Plaintiff,
and
C.D. and others - - - - - Defendants.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of greeting: We command you, that without delay you cause the following chattels, that is to say [*here enumerate the chattels recovered by the judgment for the return of which execution has been ordered to issue*], to be returned to *A.B.*, which the said *A.B.* lately in our recovered against *C.D.* [or *C.D.* was ordered to deliver to the said *A.B.*] in an action in the division of our said Court. And we further command you, that if the said chattels cannot be found in your bailiwick, you distrain the said all *C.D.* by all his lands and chattels in your bailiwick, so that neither the said *C.D.* nor any one for him do lay hands on the same until the said *C.D.* render to the said *A.B.* the said chattels; and in what manner you shall have executed this our writ make appear to the Judges of the division of our High Court of Justice, immediately after the execution hereof, and have you there then this writ. Witness, &c.

The Like, but instead of a Distress until the Chattel is returned, commanding the Sheriff to levy on defendant's Goods the assessed value of it.

[*Proceed as in the preceding form until the*, and then thus:*] And we further command you, that if the said chattels cannot be found in your bailiwick, of the goods and chattels of the said *C.D.* in your bailiwick you cause to be made £ [*the assessed value of the chattels*], and in what manner you shall have executed this our writ make appear to the Judges of the division of our High Court of Justice at Westminster, immediately after the execution hereof, and have you there then this writ. Witness, &c.

See Order XLII, Rule 4, of the present Act, p. 467, *supra*, and Order XLIX, p. 493.

These two Forms are copied from the 34th and 35th Forms in the Schedule to the Reg. Gen., Mich. Vac., 1854.

9. Writ of Attachment.

187 . B. No.

In the High Court of Justice,
Division.

Between <i>A.B.</i>	-	-	-	-	Plaintiff,
		and			
<i>C.D.</i> and others	-	-	-	-	Defendants.

Victoria, &c.

To the sheriff of greeting:

We command you to attach *C.D.* so as to have him before us in the division of our High Court of Justice wheresoever the said Court shall then be, there to answer to us, as well touching a con-

tempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you. Witness, &c.

See Order XLII, Rules 2, 4, 5, 6 of the present Act, pp. 467-8, *supra*; and Order XLIV, Rules 1 and 2, p. 482, *supra*.

10. *Writ of Sequestration.*

187 . B. No

In the High Court of Justice,

Division.

Between *A.B.* - - - - - Plaintiff,

and

C.D. and others - - - - - Defendants.

Victoria, &c.

To [*names of not less than four Commissioners*] greeting :

Whereas lately in the division of our High Court of Justice in a certain action there depending, wherein *A.B.* is plaintiff and *C.D.* and others are defendants [*or, in a certain matter then depending, intituled "In the matter of E.F.," as the case may be*] by a judgment [*or order as the case may be*] of our said Court made in the said action [*or matter*], and bearing date the day of 187 , it was ordered that the said *C.D.* should [pay into Court to the credit of the said action the sum of £ *or as the case may be*]. Know ye, therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give to you, or any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estates whatsoever of the said *C.D.*, and to collect, receive, and sequester into your hands not only all the rents and profits of his said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estates whatsoever, and therefore we command you, any three or two of you, that you do at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements, and real estates of the said *C.D.* and that you do collect, take, and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the said *C.D.* shall pay into Court to the credit of the said action the sum of £ [*or as the case may be,*] clear his contempt, and our said Court make other order to the contrary. Witness, &c.

See Order XLII, Rules 2, 4, and 6 of the present Act, pp. 467-8, *supra*; and Order XLVII., p. 490, *supra*.

SECOND SCHEDULE.

Session and Chapter.	Title.	Extent of Repeal.
6 Geo. 4, c. 84.	An Act to provide for the augmenting the salaries of the Master of the Rolls and the Vice Chancellor of England, the Chief Baron of the Court of Exchequer, and the Puisne Judges and Barons of the Courts in Westminster Hall, and to enable His Majesty to grant an annuity to such Vice Chancellor, and additional annuities to such Master of the Rolls, Chief Baron, and Puisne Judges and Barons on their resignation of their respective offices.	Section seven.
32 & 33 Vict. c. 71	The Bankruptcy Act, 1869 -	Section one hundred and sixteen from "provided that at any time," inclusive, to end of the section.
32 & 33 Vict. c. 83	The Bankruptcy Repeal and Insolvent Court Act, 1869.	Section nineteen from "provided that at any time," inclusive, to end of the section.
36 & 37 Vict. c. 66	Supreme Court of Judicature Act, 1873.	So much of sections three and sixteen as relates to the London Court of Bankruptcy, section six, section nine, section ten, so much of section thirteen as relates to Additional judges of the Court of Appeal, section thirty-four from "all matters pending in the London Court of Bankruptcy" to "London Court of Bankruptcy," section thirty-five, section forty-eight, section fifty - three, section sixty - three, section sixty - eight, section sixty-nine, section seventy, section seventy-one, section seventy-two, section seventy - three, section seventy-four, and THE WHOLE OF THE SCHEDULE.

This is the Schedule referred to in Section 33 of the present Act. See pp. 265, 266, where a list is given of the other enactments repealed by this Act in addition to those mentioned in this Schedule.

ADDITIONAL RULES OF COURT.

FIRST ORDER IN COUNCIL,*

OF 12TH AUGUST, 1875.

At the Court at Osborne House, Isle of Wight, the
12th day of August, 1875.

PRESENT,

The QUEEN'S Most Excellent Majesty in Council.

WHEREAS by an Act passed in the present Session of Parliament intituled "An Act to amend and extend the Supreme Court of Judicature Act, 1873," it is enacted that Her Majesty may, at any time after the passing and before the commencement of the said Act, by Order in Council, made upon the recommendation of the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer and the Lords Justices of Appeal in Chancery or any five of them and the other Judges of the several courts intended to be united and consolidated [by the said Principal Act as amended] by the said Act,† or of a majority of such other Judges, make any further or additional Rules of Court for carrying [the said Principal Act and] the said Act into effect, and in particular for all or any of the following matters, so far as they are not provided for by the Rules in the first Schedule to the said Act; that is to say, (1) For regulating the sittings of the High Court of Justice and the Court of

* From the "London Gazette" of 24th August, 1875.

† See Order LXIII. of the Schedule. The words in brackets are surplusage.

Appeal, and of any Divisional or other Courts thereof respectively, and of the Judges of the said High Court sitting in chambers; and (2) For regulating the pleadings, practice and procedure in the High Court of Justice and Court of Appeal; and (3) Generally for regulating any matters relating to the practice and procedure of the said courts respectively or to the duties of the officers thereof or of the Supreme Court, or to the costs of proceedings therein:

Now, therefore, Her Majesty, in pursuance of the said Act and by and with the advice of Her Privy Council, and upon the recommendation of the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer and the Lords Justices of Appeal in Chancery and a majority of the other Judges of the several Courts intended to be united and consolidated by the said Principal Act as amended by the said Act, is pleased to make and issue the additional Rules of Court following for the purposes aforesaid.

C. L. Peel.

ADDITIONAL RULES OF COURT UNDER THE SUPREME COURT OF JUDICATURE ACT, 1875, s. 17.

(Orders I to V, Printing.)

ORDER I.

Where any written deposition of a witness has been filed for use on a trial, such deposition shall be printed, unless otherwise ordered.

(See Order XXXVII., Rule 4 of the Schedule, p. 450, and Order in Chancery of 16th May, 1862, Rule 4.)

ORDER II.

The Rules of Court as to printing depositions and affidavits to be used on a trial shall not apply to depositions

and affidavits which have previously been used upon any proceeding without having been printed.

(See Order XXXVIII., Rule 6, of the Schedule, p. 452.)

ORDER III.

Other affidavits than those required to be printed by Order XXXVIII., Rule 6, in the Schedule to the Supreme Court of Judicature Act, 1875, may be printed if all the parties interested consent thereto, or the Court or Judge so order.

(This was Order LVI., Rule 6, of the Schedule, originally).

ORDER IV.

The 3rd Rule of the Order XXXIV., in the first Schedule to the Supreme Court of Judicature Act, 1875, shall apply to a special case, pursuant to the Act of 13 and 14 Victoria, c. 35.

(See pp. 421, 422).

ORDER V.

Where, pursuant to Rules of Court, any pleading, special case, petition of right,* deposition, or affidavit is to be printed, and where any printed or other office copy thereof is to be taken, the following regulations shall be observed :

1. The party on whose behalf the deposition or affidavit is taken and filed is to print the same in the manner provided by RULE 2 OF ORDER LVI. in the first Schedule to the Supreme Court of Judicature Act, 1875.

(See Order IX., Rule 3 of Chancery Orders).

2. To enable the party printing, to print any deposition, the officer with whom it is filed shall on demand

* See the Petitions of Right Act, 1860 (23 & 24 Vict., c. 34), and Chancery Order of 1st February, 1862.

deliver to such party a copy written on draft paper on one side only.

(Compare Order in Chancery of 16th May, 1862, Rule 3).

3. The party printing shall, on demand in writing, furnish to any other party or his solicitor any number of printed copies, not exceeding ten, upon payment therefor at the rate of ONE PENNY PER FOLIO for one copy, and ONE HALFPENNY PER FOLIO for every other copy.

Under the former Chancery practice the defendant could demand ten printed copies of the Bill (Order IX., Rule 5), at $\frac{1}{2}$ d. per folio (Order XL., Rule 19); and the plaintiff could demand one printed office copy of the answer at 4d. per folio, and ten other printed copies at $\frac{1}{2}$ d. per folio (Order of 6th March, 1860, Rules 6, 7, and 8). Subject thereto, parties delivering to other parties on demand copies of the pleadings, were entitled to charge 4d. per folio (pauper parties charged and paid $1\frac{1}{2}$ d. per folio). (Regul. as to fees, Hil. T. 1860, IV., 1, 2, 3).

4. The solicitor of the party printing shall give credit for the whole amount payable by any other party for printed copies.

(i.e., to the party printing).

5. The party entitled to be furnished with a print shall not be allowed any charge in respect of a written copy, unless the Court or Judge shall otherwise direct.

(Taken from Chancery Order XL, Rule 8, and Order of Mar. 6, 1860, Rule 13.)

6. The party by or on whose behalf any deposition, affidavit, or certificate is filed, shall leave a copy with the officer with whom the same is filed, who shall examine it with the original and mark it as an office copy; such copy shall be a copy printed as above provided where such deposition or affidavit is to be printed.

(Taken from Chancery Orders of Mar. 6, 1860, Rules 2 and 3, and 16th May, 1864, Rule 3, and Order XXXVI, Rule 2.)

7. The party or solicitor who has taken any printed or written office copy of any deposition or affidavit is

to produce the same upon every proceeding to which the same relates.

(Copied from Chancery Order XXXVI, Rule 10.)

8. Where any party is entitled to a copy of any deposition, affidavit, proceeding or document filed or prepared by or on behalf of another party, which is NOT REQUIRED TO BE PRINTED, such copy shall be furnished by the party by or on whose behalf the same has been filed or prepared.

(Copied from Chancery Order XXXVI, Rule 5.)

9. The party requiring any such copy, or his solicitor, is to make a written application to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges, and thereupon such copy is to be made and ready to be delivered at the expiration of TWENTY-FOUR HOURS after the receipt of such request and undertaking, or within such other time as the Court or Judge may in any case direct, and is to be furnished accordingly upon demand and payment of the proper charges.

(Copied from Chancery Order XXXVI, Rules 4 and 6, "24" being substituted for "48" hours.)

10. In the case of an *ex parte* application for an injunction or writ of *ne exeat regno*, the party making such application is to furnish copies of the affidavits upon which it is granted upon payment of the proper charges immediately upon the receipt of such written request and undertaking as aforesaid, or within such time as may be specified in such request, or may have been directed by the Court.

(Copied from Chancery Order XXXVI, Rule 9.)

11. It shall be stated in a note at the foot of every affidavit filed on whose behalf it is so filed, and such note shall be printed on every printed copy of an affidavit or set of affidavits, and copied on every office copy and copy furnished to a party.

(Partly taken from Chancery Order of 5 Feb. 1861.)

12. The name and address of the party or solicitor by whom any copy is furnished is to be endorsed thereon in like manner as upon proceedings in court, and such party or solicitor is to be answerable for the same being a true copy of the original, or of an office copy of the original, of which it purports to be a copy, as the case may be.

(Copied from Chancery Order XXXVI, Rule 8.)

13. The folios of all printed and written office copies, and copies delivered or furnished to a party, shall be numbered consecutively in the margin thereof, and such WRITTEN copies shall be written in a neat and legible manner on the same paper as in the case of printed copies.

(Copied from Chancery Order XXXVI, Rules 8 and 11.)

14. In case any party or solicitor who shall be required to furnish any such written copy as aforesaid shall either refuse or, for twenty-four hours from the time when the application for such copy has been made, neglect to furnish the same, the person by whom such application shall be made shall be at liberty to procure an office copy from the office in which the original shall have been filed, and in such case no costs shall be due or payable to the solicitor so making default in respect of the copy or copies so applied for.

(Copied from Chancery Order XXXVI, Rule 12.)

15. Where by any order of the Court (whether of appeal or otherwise), or a Judge, any pleading, evidence, or other document is ordered to be printed, the Court or Judge may order the expense of printing to be borne and allowed, and printed copies to be furnished by and to such parties and upon such terms as shall be thought fit.

COSTS.

ORDER VI.

The following regulations as to costs of proceedings in the Supreme Court of Judicature shall regulate such costs from the commencement of the Supreme Court of Judicature Acts, 1873 and 1875 :—

1. Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed “LOWER SCALE” in the Schedule hereto—

(Copied from the Chancery Regulations as to fees, 1860.)

In all actions for purposes to which any of the forms of indorsement of claims on writs of summons in Sections II, IV, and VII, in Part II of Appendix (A.), referred to in the 3rd Rule of Order III, in the Schedule to the Supreme Court of Judicature Act, 1875, or other similar forms, are applicable (except as after provided in actions for injunctions) :

(The Sections referred to contain Common Law indorsements for debt and damages, &c., special and otherwise.)

In all causes and matters by the 34th Section of the Supreme Court of Judicature Act, 1873, assigned to the Queen's Bench Division of the Court ;

(See p. 84.)

In all causes and matters by the 34th Section of the said Act assigned to the Common Pleas Division of the Court.

(See p. 85.)

In all causes and matters by the 34th Section of the said Act assigned to the Exchequer Division of the Court ;

(See p. 85.)

In all causes and matters by the 34th Section of the said Act assigned to the Probate, Divorce, and Admiralty Division of the Court ;

(See p. 86.)

And also in causes and matters by the 34th Section of the said Act assigned to the Chancery Division of the Court in the following cases (that is to say) :—

(See p. 83.)

1. By creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law or next-of-kin, in which the personal or real or personal and real estate for or against or in respect of which or for an account or administration of which the demand may be made shall be under the amount or value of £1,000.
2. For the execution of trusts or appointment of new trustees in which the trust estate or fund shall be under the amount or value of £1,000.
3. For dissolution of partnership or the taking of partnership or any other accounts in which the partnership assets or the estate or fund shall be under the amount or value of £1,000.
4. For foreclosure or redemption, or for enforcing any charge or lien in which the mortgage whereon the suit is founded, or the charge or lien sought to be enforced, shall be under the amount or value of £1,000.

5. And for specific performance in which the purchase-money or consideration shall be under the amount or value of £1,000.
6. In all proceedings under the Trustees Relief Acts, or under the Trustees Act, or under any such Acts, in which the trust estate or fund to which the proceeding relates shall be under the amount or value of £1,000.
7. In all proceedings relating to the guardianship or maintenance of infants, in which the property of the infant shall be under the amount or value of £1,000.
8. In all proceedings by original special case, and in all proceedings relating to funds carried to separate accounts, and in all proceedings under any railway or private Act of Parliament, or under any other statutory or summary jurisdiction, and generally in all other cases where the estate or fund to be dealt with shall be under the amount or value of £1,000.

(Subsections 1, 2 (except as to new trustees), 4, 5, 6, 7, 8, are copied *verbatim* from the Chancery Regulations as to Fees, 1860.

As to the £1,000, see *Flockton v. Peake*, 12 W. R., 1025; *Re Reece*, 2 L. R. Eq. 609.)

2. Solicitor (*sic*) shall be entitled to charge and be allowed the fees set forth in the column headed "HIGHER SCALE" in the Schedule hereto in all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property and infringement of rights, easements, patents and copyrights, and other similar cases where the procuring such injunction is the principal relief sought to be obtained, and in all cases other than those to which the fees in the column headed "lower scale" are hereby made applicable.

(See Chancery Regulations as to Fees, 1860, II., 2.)

3. Notwithstanding these Rules, the Court or Judge may in any case direct the fees set forth in either of the said two columns to be allowed to all or either or any of the parties, and as to all or any part of the costs.

4. The provisions of Order LXIII., in the first Schedule to the Supreme Court of Judicature Act, 1875, shall apply to these Rules.

(Order LXIII is the Interpretation Clause.)

The SCHEDULE above referred to.

(An Order or Rule herein referred to by number shall mean the Order or Rule so numbered in the first Schedule to the Supreme Court of Judicature Act, 1875. See pp. 649, 650).

WRITS, SUMMONSES, AND WARRANTS.	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Writ of summons for the commencement of any action	0	6	8	0	13	4
And for endorsement of claim, if special	0	5	0	0	5	0
Concurrent writ of summons	0	6	8	0	6	8
Renewal of a writ of summons	0	6	8	0	6	8
Notice of a writ for service in lieu of writ out of jurisdiction	0	4	0	0	5	0
Writ of inquiry	1	1	0	1	1	0
Writ of mandamus or injunction	0	10	0	1	1	0
Or per folio	0	1	4	0	1	4
Writ of <i>subpœna ad testificandum duces tecum</i>	0	6	8	0	6	8
And if more than four folios, for each folio beyond four	0	1	4	0	1	4
Writ or writs of <i>subpœna ad testificandum</i> for any number of persons not exceeding three, and the same for every additional number not exceeding three	0	6	8	0	6	8
Writ of <i>distringas</i> , pursuant to statute 5 Vict., c. 8.*	0	13	4	0	13	4
Writ of execution, or other writ to enforce any judgment or order	0	7	0	0	10	0
And if for more than four folios, for each folio beyond four	0	1	4	0	1	4
Procuring a writ of execution or notice to the sheriff, marked with a seal of renewal	0	6	8	0	6	8
Notice thereof to serve on sheriff	0	4	0	0	5	0
Any writ not included in the above	0	7	0	0	10	0

* It should be c. 5. See pp. 489, 490.

	Lower Scale. £ s. d.	Higher Scale. £ s. d.
These fees include all endorsements and copies, or <i>præcipes</i> , for the officer sealing them, and attendances to issue or seal, but not the Court fees.		
Summons to attend at Judge's chambers	0 3 0	0 6 8
Or if special, at taxing officer's discretion, not exceeding.. .. .	0 6 8	1 1 0
Copy for the Judge, when required.. ..	0 2 0	0 2 0
Or per folio	—	0 0 4
Original summons for proceedings in chambers in the Chancery division	0 13 4	1 1 0
And attending to get same and duplicate sealed, and at the proper office to file duplicate and get copies for service stamped	0 13 4	0 13 4
Copy for the Judge	0 2 0	0 2 0
Or per folio	—	0 0 4
Endorsing same and copies under 8th Rule of the 35th of the Consolidated General Orders of the Court of Chancery	0 6 8	0 6 8

SERVICES, NOTICES, AND DEMANDS:

Service of any writ, summons, warrant, interrogatories, petition, order, notice, or demand on a party who has not entered an appearance, and if not authorised to be served by post.. ..	0 5 0	0 5 0
If served at a distance of more than two miles from the nearest place of business, or office of the solicitor serving the same, for each mile beyond such two miles therefrom	0 1 0	0 1 0
Where in consequence of the distance of the party to be served, it is proper to effect such service through an agent (other than the London agent), for correspondence in addition ..	0 7 0	0 7 0
Where more than one attendance is necessary to effect service, or to ground an application for substituted service, such further allowance may be made as the taxing officer shall think fit.		
For service out of the jurisdiction such allowance is to be made as the taxing officer shall think fit.		
Service where an appearance has been entered on the solicitor or party	0 2 6	0 2 6
Or if authorised to be served by post	0 1 6	0 1 6
Where any writ, order, and notice, or any two of them, have to be served together, one fee only for service is to be allowed.		

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	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
In addition to the above fees, the following allowances are to be made:—						
As to writs, if exceeding two folios, for copy for service, per folio beyond such two	0	0	4	0	0	4
As to summons to attend at the Judges' Chambers for each copy to serve	0	1	0	0	2	0
Or per folio	0	0	4	0	0	4
As to notices in proceedings to wind up companies, for preparing or filling up each notice to creditors to attend and receive debts, and to contributories to settle list of contributories ..	0	1	0	0	1	0
And for preparing or filling up each notice to contributories to be served with a general order for a call, or an order for payment of a call ..	0	1	0	0	1	0
And for drawing notice to be served on contributories or creditors of a meeting, per folio ..	0	1	0	0	1	0
For each copy of the last-mentioned notice to serve, per folio	0	0	4	0	0	4
For preparing or filling up for service in any other cause or matter, each notice to creditors to prove claims, and each notice that cheques may be received, specifying the amount to be received for principal and interest, and costs, if any ..	0	1	0	0	1	0
For preparing notice to produce or admit, and one copy	0	5	0	0	7	6
If special or necessarily long, such allowance as the taxing officer shall think proper, not exceeding per folio	0	0	8	0	1	4
And for each copy beyond the first, such allowance as the taxing-master shall think proper, not exceeding per folio	0	0	4	0	0	4
For preparing notice of motion	0	2	0	0	5	0
Or per folio	0	1	0	0	1	0
Copy for service	0	1	0	0	1	0
Or per folio	—	—	—	0	0	4
For preparing any necessary or proper notice, not otherwise provided for and demand	0	1	6	0	1	6
Or if special, and necessarily exceeding three folios, for preparing same, for each folio beyond three	0	1	0	0	1	0
And for each copy for service, per folio beyond such three	0	0	4	0	0	4
Copies for service of interrogatories and petitions, and of orders with necessary notices (if any) to accompany, per folio	0	0	4	0	0	4

	Lower Scale. £ s. d.	Higher Scale. £ s. d.
Except as otherwise provided, the allowances for services include copies for service.		
Where notice of filing affidavits is required, only one notice is to be allowed for a set of affidavits filed, or which ought to be filed together.		
In proceedings to wind up a company, the usual charges relating to printing shall be allowed in lieu of copies for service, where the fee for copies would exceed the charges for printing, and amount to more than £3.		
Where any appointment is or ought to be adjourned, service of a notice of the adjournment, or next appointment, is not to be allowed.		

APPEARANCES.

Entering any appearance	0 6 8	0 6 8
If entered at one time, for more than one person, for every defendant beyond the first	0 1 0	0 2 0
If a person appearing to a writ of summons to recover land limits his defence by his memorandum of appearance, in addition to the above	0 6 8	0 6 8

INSTRUCTIONS.

To sue or defend	0 6 8	0 13 4
For statement of complaint	0 13 4	2 2 0
For statement or further statement of defence ..	0 6 8	0 13 4
For counter claim	0 6 8	0 13 4
For reply by plaintiff when defendant sets up a counter-claim	0 13 4	1 1 0
For reply or further reply in any other case by plaintiff or other person, with or without joinder of issue	0 6 8	0 13 4
For confession of defence	0 6 8	0 13 4
For joinder of issue without other matter, and for demurrer	0 6 8	0 13 4
For special case, special petition, any other pleading (not being a summons), and interrogatories for examination of a party or witness ..	0 6 8	0 13 4
To amend any pleading	0 6 8	0 13 4
For affidavits in answer to interrogatories, and other special affidavits	0 6 8	0 6 8
To appeal	0 13 4	1 1 0
To add parties by order of Court or Judge ..	0 6 8	0 13 4

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
For counsel to advise on evidence when the evidence in chief is to be taken orally	0	5	8	0	5	8
Or not to exceed	0	13	4	1	1	0
For counsel to make any application to a Court or Judge where no other brief	0	5	8	0	10	0
For brief on motion for special injunction ..	0	13	4	1	1	0
For brief on hearing or trial of action upon notice of trial given, whether such trial be before a Judge, with or without a Jury, or before an official or special Referee, or on trial of an issue of fact before a Judge, Commissioner, or Referee, or on assessment of damages ..	1	1	0	2	2	0
For such brief, and for brief on the hearing of an appeal when witnesses are to be examined or cross-examined, such fee may be allowed as the taxing officer shall think fit, having regard to all the circumstances of the case, and to other allowances, if any, for attendances on witnesses and procuring evidence.						
The fees for instructions for brief are not to apply to a hearing on further consideration.						

DRAWING PLEADINGS AND OTHER DOCUMENTS.

Statement of claim	0	10	0	1	1	0
Or per folio	0	1	0	0	1	0
Statement of defence	0	5	0	0	10	0
Or per folio	0	1	0	0	1	0
Statement of defence and counter claim	0	5	0	1	1	0
Or per folio	0	1	0	0	1	0
Reply, with or without joinder of issue, confession of defence, joinder of issue without other matter, demurrer, and any other pleading (not being a petition or summons) and amendments of any pleading	0	5	0	0	10	0
Or per folio	0	1	0	0	1	0
Particulars, breaches and objections, when required, and one copy to deliver	0	5	0	0	6	8
Or such amount as the taxing officer shall think fit, not exceeding per folio	0	0	8	0	1	4
If more than one copy to be delivered, for each other copy per folio	0	0	4	0	0	4
Special case, whether original or in action, affidavits in answer to interrogatories and other special affidavits, special petitions, and interrogatories, per folio	0	1	0	0	1	0

	Lower Scale.	Higher Scale.
£ s. d.	£ s. d.	£ s. d.
Brief, on trial or hearing of cause, issue of fact, assessment of damages, examination of witnesses, demurrer, special case and petition before a Court or Judge, Sheriff, Commissioner, Referee, examiner, or officer of the Court, when necessary and proper in addition to pleadings, including necessary and proper observations, per folio	0 1 0	0 1 0
Brief on application to add parties	0 6 8	0 10 0
Or per folio	0 1 0	0 1 0
Brief on further consideration, per sheet of 10 folios	0 6 8	0 6 8
Accounts, statements, and other documents for the Judges' chambers, when required, and fair copy to leave, per folio	0 0 8	0 1 4
Advertisements to be signed by Judge's clerk, including attendance therefor	0 6 8	0 13 4
Bill of costs for taxation, including copy for the taxing officer	0 0 8	0 0 8

COPIES.

Of pleadings, briefs, and other documents where no other provision is made, at per folio	0 0 4	0 0 4
Where, pursuant to Rules of Court, any pleading, special case or petition of right, or evidence is printed, the solicitor of the party printing shall be allowed for a copy for the printer (except when made by the officer of the Court), at per folio	0 0 4	0 0 4
And for examining the proof print, at per folio	0 0 2	0 0 2
And for printing the amount actually and properly paid to the printer, not exceeding per folio	0 1 0	0 1 0
And in addition for every 20 beyond the first 20 copies, at per folio	0 0 1	0 0 1
And where any part shall properly be printed in a foreign language, or as a <i>fac simile</i> , or in any unusual or special manner, or where any alteration in the document being printed becomes necessary after the first proof, such further allowance shall be made as the taxing officer shall think reasonable.		
These allowances are to include all attendances on the printer.		

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
To inspect, or produce for inspection, documents referred to in any pleading or affidavit, pursuant to notice under Order XXXI., Rule 14, (See p. 412)	0	6	8	0	6	8
Or per hour	0	6	8	0	6	8
To obtain or give any necessary or proper consent	0	6	8	0	6	8
To obtain an appointment to examine witnesses ..	0	6	8	0	6	8
On examination of witnesses before any examiner, commissioner, officer, or other person ..	0	13	4	0	13	4
Or according to circumstances, not to exceed ..	2	2	0	2	2	0
Or if without counsel, not to exceed	—			3	3	0
On deponents being sworn, or by a solicitor or his clerk to be sworn, to an affidavit in answer to interrogatories or other special affidavit ..	0	6	8	0	6	8
On a summons at Judges' chambers	0	6	8	0	6	8
Or according to circumstances, not to exceed ..	1	1	0	1	1	0
In the Chancery Division, all allowances for attending at the Judges' chambers are to be by the Judge or chief clerk, as heretofore.						
To file chief clerks' and taxing masters' certificates, and get copy marked as an office copy ..	0	6	8	0	6	8
On counsel with brief or other papers—						
If counsel's fee one guinea	0	3	4	0	6	8
If more and under five guineas	0	6	8	0	6	8
If five guineas and under twenty guineas ..	0	6	8	0	13	4
If twenty guineas	0	13	4	1	1	0
If forty guineas or more	—			2	2	0
On consultation or conference with counsel ..	0	13	4	0	13	4
To enter or set down action, demurrer, special case, or appeal, for hearing or trial	0	6	8	0	6	8
In Court on motion of course and on counsel and for order	0	10	0	0	13	4
To present petition for order of course and for order	0	6	8	0	13	4
In Court on every special motion, each day ..	0	6	8	0	13	4
On same when heard each day	0	13	4	0	13	4
Or according to circumstances	1	1	0	2	2	0
On demurrer, special case, or special petition, or application adjourned from the Judges' chambers, when in the special paper for the day, or likely to be heard	0	6	8	0	10	0
On same when heard	0	13	4	1	1	0
Or according to circumstances, not to exceed ..	1	1	0	2	2	0

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
On hearing or trial of any cause, or matter, or issue of fact, in London, or Middlesex, or the town where the solicitor resides or carries on business, whether before a Judge with or with- out a Jury, or Commissioner, or Referee, or on assessment of damages, when in the paper ..	0	10	0	0	10	0
When heard or tried	0	13	4	1	1	0
Or according to circumstances	2	2	0	2	2	0
When not in London or Middlesex, nor in the town where the solicitor resides or carries on business, for each day (except Sundays) he is necessarily absent	2	2	0	3	3	0
And expenses (besides actual reasonable travelling expenses) each day, including Sundays ..	1	1	0	1	1	0
Or if the solicitor has to attend on more than one trial or assessment at the same time and place, in each case	1	1	0	1	11	6
The expenses in such case to be rateably divided.						
To hear judgment when same adjourned	0	6	8	0	13	4
Or according to circumstances	0	13	4	1	1	0
To deliver papers (when required) for the use of a Judge prior to a hearing	0	6	8	0	6	8
If more than one Judge	0	13	4	0	13	4
On taxation of a bill of costs	0	6	8	0	6	8
Or according to circumstances, not to exceed ..	2	2	0	2	2	0
In causes for purposes within the cognizance of the Court of Chancery before the Act passed, such further fee as the taxing officer may think fit, not exceeding the allowances heretofore made.						
To obtain or give an undertaking to appear ..	0	6	8	0	6	8
To present a special petition, and for same answered	0	6	8	0	6	8
On printer to insert advertisement in Gazette ..	0	6	8	0	6	8
On printer to insert same in other papers, each printer	—			0	6	8
Or every two	0	6	8	—		
On registrar to certify that a cause set down is settled, or for any reason not to come into the paper for hearing	0	6	8	0	6	8
For an order drawn up by chief clerk, and to get same entered	0	6	8	0	6	8

	Lower Scale. £ s. d.	Higher Scale: £ s. d.
On counsel to procure certificate that cause proper to be heard as a short cause, and on registrar to mark same	0 6 8	0 6 8
To mark conveyancing counsel or taxing master ..	0 6 8	0 6 8
For preparing and drawing up an order made at chambers in proceedings to wind-up a company and attending for same, and to get same entered	0 13 4	0 13 4
And for engrossing every such order, per folio ..	0 0 4	0 0 4

NOTE.—An order of course means an order made on an *ex parte* application, and to which a party is entitled as of right on his own statement and at his own risk.

OATHS AND EXHIBITS.

Commissioners to take oaths or affidavits. For every oath, declaration, affirmation, or attestation upon honour, in London or the country ..	0 1 6	0 1 6
The solicitor for preparing each exhibit in town or country	0 1 0	0 1 0
The commissioner for marking each exhibit ..	0 1 0	0 1 0

TERM FEES.

For every term commencing on the day the sittings in London and Middlesex of the High Court of Justice commence, and terminating on the day preceding the next such sittings, in which a proceeding in the cause or matter by or affecting the party, other than the issuing and serving the writ of summons, shall take place	0 15 0	0 15 0
And further, in country agency causes or matters, for letters	0 6 0	0 6 0
Where no proceeding in the cause or matter is taken which carries a term fee, a charge for letters may be allowed, if the circumstances require it.		
In addition to the above, an allowance is to be made for the necessary expense of postages, carriage and transmission of documents.		

N.B.—The above Schedule is substituted alike for the first Schedule to the Chancery Regulations as to Fees, Hil. T., 1860, and the Schedule to the "Directions to the Masters," Hil. T., 1853.

SPECIAL ALLOWANCES AND GENERAL PROVISIONS.

1. As to writs of summons requiring special endorsement, original special cases, pleadings and affidavits in answer to interrogatories, and other special affidavits, when the higher scale is applicable, the taxing officer may, in lieu of the allowances for instructions and preparing or drawing, make such allowance for work, labour, and expenses in or about the preparation of such documents as in his discretion he may think proper.

(Adapted from the second Schedule to the Chancery Regulations as to Fees, Hil. T., 1860.)

2. As to drawing any pleading or other document, the fees allowed shall include any copy made for the use of the solicitor, agent, or client, or for counsel to settle.

(Copied from the second Schedule to the Chancery Regulations as to Fees, Hil. T., 1860.)

3. As to instructions to sue or defend, when the higher scale is applicable, if in consequence of the instructions being taken separately from more than three persons (not being co-partners) the taxing officer shall consider the fee above provided inadequate, he may make such further allowance as he shall in his discretion consider reasonable.

(Compare Chancery Order XL, Rule 12.)

4. As to affidavits, when there are several deponents to be sworn, or it is necessary for the purpose of an affidavit being sworn to go to a distance, or to employ an agent, such reasonable allowance may be made as the taxing officer in his discretion may think fit.

5. The allowances for instructions and drawing an affidavit in answer to interrogatories and other special affidavits, and attending the deponent to be sworn, include all attendances on the deponents to settle and read over.

6. As to delivery of pleadings, services, and notices, the fees are not to be allowed when the same solicitor is for both parties, unless it be necessary for the purpose of making an affidavit of service.

(Copied from the second Schedule to the Chancery Regulations as to Fees, Hil. T., 1860.)

7. As to perusals; the fees are not to apply where the same solicitor is for both parties.

(Copied from the second Schedule to the Chancery Regulations as to Fees, Hil. T., 1860.)

8. As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed.

(Copied from Chancery Order XL., Rule 32.)

9. As to agency correspondence, in country agency causes and matters, if it be shown to the satisfaction of the taxing officer that such correspondence has been special and extensive, he is to be at liberty to make such special allowance in respect thereof as in his discretion he may think proper.

(Taken from the second Schedule to the Chancery Regulations of Hil. T., 1860, as to Fees.

10. As to attendances at the Judges' Chambers, where, from the length of the attendance, or from the difficulty of the case, the judge or master shall think the highest of the above fees an insufficient remuneration for the services performed, or where the preparation of the case or matter to lay it before the judge or master in chambers, or on a summons, shall have required skill and labour for which no fee has been allowed, the judge or master may allow such fee in lieu of the fee of £1. 1s. above provided, not exceeding £2. 2s., or where the higher scale is applicable, £3. 3s., or in proceedings to wind up a company, £5. 5s., as in his discretion he may think fit; and where the prepara-

tion of the case or matter to lay it before a judge at chambers on a summons shall have required and received from the solicitor such extraordinary skill and labour as materially to conduce to the satisfactory and speedy disposal of the business, and therefore shall appear to the judge to deserve higher remuneration than the ordinary fees, the judge may allow to the solicitor, by a memorandum in writing expressly made for that purpose and signed by the judge, specifying distinctly the grounds of such allowance, such fee, not exceeding ten guineas, as in his discretion he may think fit, instead of the above fees of £2. 2s., £3. 3s., and £5. 5s.

(Copied *verbatim* from the second Schedule to the Chancery Regulations as to Fees of Hil. T., 1860; £2. 2s. and £3. 3s. being substituted for £1. 1s. and £2. 2s., and £5. 5s. added as to winding up.)

11. As to attendances at the Judges' Chambers, where by reason of the non-attendance of any party (and it is not considered expedient to proceed *ex parte*), or where by reason of the neglect of any party in not being prepared with any proper evidence, account, or other proceeding, the attendance is adjourned without any useful progress being made, the Judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending by the party so absent or neglectful, or by his solicitor personally; and the party so absent or neglectful is not to be allowed any fee as against any other party, or any estate or fund in which any other party is interested.

(Copied partly from Chancery Order XL., Rule 31.)

12. A folio is to comprise seventy-two words, every figure comprised in a column being counted as one word.

(This is copied from the Chancery Regulations as to Fees, IV., 4.

13. Such costs of procuring the advice of counsel on the pleadings, evidence, and proceedings in any cause or matter as the taxing officer shall in his discretion think

just and reasonable, and of procuring counsel to settle such pleadings and special affidavits as the taxing officer shall in his discretion think proper to be settled by counsel, are to be allowed; but as to affidavits, a separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be so settled, which are or ought to be filed at the same time.

(Taken partly from the Directions to the Masters, Rule 4, and Chancery Order XL., Rule 17.)

14. As to counsel attending at Judges' Chambers, no costs thereof shall in any case be allowed, unless the Judge certifies it to be a proper case for counsel to attend.

(This is copied *verbatim* from the Directions to the Masters, Rule 5, and Chancery Order XL, Rule 29.)

15. As to the inspection of documents under Order XXXI., Rule 14, no allowance is to be made for any notice or inspection, unless it is shown to the satisfaction of the taxing officer that there were good and sufficient reasons for giving such notice and making such inspection.

(See pp. 412-14, and 650.)

16. As to taking copies of documents in possession of another party, or extracts therefrom, under Rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require, at the rate of 4d. per folio; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof.

(4d. was the amount charged by the Record and Writs' clerks for copies. *Regulas to Fees*, Sch. 4. No fee was payable for *taking* copies. *Daniel's Ch. Pract.*, 1698.)

17. Where a petition in any cause or matter assigned to the Chancery division is served, and notice is given to the party served that in case of his appearance in Court

his costs will be objected to, and accompanied by a tender of costs for perusing the same, the amount to be tendered shall be £2. 2s. The party making such payment shall be allowed the same in his costs, provided such service was proper, but not otherwise; but this order is without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the Court or Judge shall consider the party entitled, notwithstanding such notice or tender, to appear in Court. In any other case for which a solicitor of a party served necessarily or properly peruses any such petition without appearing thereon, he is to be allowed a fee not exceeding £3. 3s.

(See *Roberts v. Ball*, 24 L. J. (Ch.) 471; *Wood v. Boucher*, 19 W.R., 234; *Re Duggan*, L.R., 8 Eq., 697; 40s. is the amount usually tendered, Daniel's Ch. Pract., p. 1460, n., q.)

18. The Court or Judge may, at the hearing of any cause or matter, or upon any application or procedure in any cause or matter in Court or at Chambers, and whether the same is objected to or not, direct the costs of any pleading, affidavit, evidence, notice to cross-examine witnesses, account, statement, or other proceeding, or any part thereof, which is improper, unnecessary, or contains unnecessary matter, or is of unnecessary length, to be disallowed, or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, or to contain unnecessary matter, or to be of unnecessary length; and in such case the party whose costs are so disallowed shall pay the costs occasioned to the other parties by such unnecessary proceeding, matter, or length; and in any case where such question shall not have been raised before and dealt with by the Court or Judge, the taxing officer may look into the same (and, as to evidence, although the same may be entered as read in any decree or order) for the purpose

aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so.

(This is an improved version of Chancery Order XL., Rules 9 and 10, the last sentence being new ; see *Re Farington*, 33 Beav., 347).

19. In any case in which, under the preceding rule No. 18, or any other rule of Court, or by the order or direction of a Court or Judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay ; or such officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manners as costs ordered to be paid may be recovered.

(Setting off costs against costs in same suit, is in accordance with the former practice. *Daniel's Ch. Pract.*, p. 1269).

20. Where in the Chancery division any question as to any costs is under the preceding rule 18 dealt with at Chambers, the Chief Clerk is to make a note thereof, and state the same on his allowance of the fees for attendances at Chambers, or otherwise as may be convenient for the information of the taxing officer.

(This is copied from Chancery Order XL., Rule 10.)

21. Where any party appears upon any application or proceeding in Court or at Chambers, in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, he is not to be allowed any costs of such application unless the Court or Judge shall expressly direct such costs to be allowed.

(Compare Chancery Order XL., Rule 28 ; and Rule 24, *infra*.)

22. As to applications to extend the time for taking any

proceeding limited by Rules of Court (subject to any special order as to the costs of and occasioned by any such application), the costs of one application are, without special order, to be allowed as costs in the cause or matter, but (unless specially ordered) no costs are to be allowed of any further application to the party making the same as against any other party, or any estate or fund in which any other party is interested.

(See, on this, Order LVII., Rule 6, of the Schedule to the Act, and Chancery Order XXXVII., Rules 17 and 18.)

23. The taxing officers of the Supreme Court, or of any division thereof, shall, for the purpose of any proceeding before them, have power and authority to administer oaths, and shall, in relation to the taxation of costs, perform all such duties as have heretofore been performed by any of the masters, taxing masters, registrars, or other officers of any of the Courts whose jurisdiction is by the Act transferred to the High Court of Justice or Court of Appeal, and shall, in respect thereof, have such powers and authorities as previous to the commencement of the Act were vested in any of such officers, including examining witnesses, directing production of books, papers, and documents, making separate certificates or allocaturs, requiring any party to be represented by a separate solicitor, and to direct and adopt all such other proceedings as could be directed and adopted by any such officer on references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court or a Judge.

(This is partly copied from the Chancery Order XV., Rule 1.)

24. The taxing officer shall have authority to arrange and direct what parties are to attend before him on the taxation of costs to be borne by a fund or estate, and to

disallow the costs of any party whose attendance such officer shall in his discretion consider unnecessary in consequence of the interest of such party in such fund or estate being small or remote, or sufficiently protected by other parties interested.

(Compare Rule 21, *supra*, and see *Stahlschmidt v. Lett*, 9 W. R., 830, as to the exercise of this discretion.)

25. When any party entitled to costs refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the taxing officer shall be at liberty to certify the costs of the other parties, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect.

26. As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through overcaution, negligence, or mistake, or merely at the desire of the party.

(This is copied *verbatim* from Chancery Order XIV., Rule 32.)

27. As to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed.

(This is copied from the Regulations of Hil. T., 1860, as to Fees, second Schedule.)

28. The RULES, ORDERS, and PRACTICE OF ANY COURT WHOSE JURISDICTION IS TRANSFERRED to the High Court of

Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the Act, shall, in so far as they are NOT INCONSISTENT with the Act, and the Rules of Court in pursuance thereof, REMAIN IN FORCE and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal.

(This is a very important saving clause.)

29. As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances.

(Fees to Counsel are generally left to the taxing master's discretion; 6 Beav., 454; 13 W.R., 1056; 1 K. & J., 220. See, also, as to solicitor's fees, Chancery Order XL., Rule 37.)

30. Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any item or items, may, at any time before the certificate or *allocatur* is signed, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the item or items, or parts or part thereof objected to, and may thereupon apply to the taxing officer to review the taxation in respect of the same.

(This is copied *verbatim* from the Chancery Order XL., Rule 33, "or allocatur" being added.)

31. Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.

(This is copied *verbatim* from the Chancery Order XL., Rule 34.)

32. Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as to the judge may seem just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.

(This is copied from the Chancery Order XL., Rule 35, "or allocatur" being added, and the application need not have been to the Judge who made the order for taxation.)

33. Such application shall be heard and determined by the judge upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof, unless the judge shall otherwise direct.

(Copied *verbatim* from the Chancery Order XL., Rule 36.)

34. When a writ of summons for the commencement of an action shall be issued from a district, and when an action proceeds in a District Registry, all fees and allowances, and

rules and directions relating to costs, which would be applicable to such proceeding if the writ of summons were issued in London, and if the action proceeded in London, shall apply to such writ of summons issued from and other proceedings in the District Registry.

<i>Cairns, C.</i>	<i>John Mellor.</i>
<i>A. E. Cockburn.</i>	<i>Robt. Lush.</i>
<i>G. Jessel.</i>	<i>Wm. Baliol Brett.</i>
<i>Coleridge</i>	<i>A. Cleasby.</i>
<i>Fitzroy Kelly.</i>	<i>W. R. Grove.</i>
<i>W. M. James.</i>	<i>J. R. Quain.</i>
<i>George Mellish.</i>	<i>James Hannen</i>
<i>Richd. Malins.</i>	<i>C. E. Pollock.</i>
<i>James Bacon.</i>	<i>W. V. Field.</i>
<i>Charles Hall.</i>	<i>J. W. Huddleston</i>
<i>G. Bramwell.</i>	<i>Nathaniel Lindley.</i>
<i>Colin Blackburn.</i>	

FORMATION OF DISTRICT REGISTRIES.

SECOND ORDER IN COUNCIL,

12TH AUGUST, 1875.

At the Court at Osborne House, Isle of Wight, the
12th day of August, 1875.

PRESENT,

The QUEEN'S Most Excellent Majesty in Council.

WHEREAS by "The Supreme Court of Judicature Act, 1873," it is enacted that it shall be lawful for Her Majesty, by Order in Council, from time to time to direct that there shall be District Registrars in such places as shall be in such Order mentioned for districts to be thereby defined, from which writs of summons for the commencement of actions in the High Court of Justice may be issued, and in which such proceedings may be taken and recorded, as are hereinafter mentioned, and Her Majesty may thereby appoint that any Registrar of any County Court, or any Registrar or Prothonotary or District Prothonotary of any local Court whose jurisdiction is hereby transferred to the said High Court of Justice, or from which an appeal is hereby given to the said Court of Appeal, or any person who, having been a District Registrar of the Court of Probate, or of the Admiralty Court, shall under this Act become and be a District Registrar of the said High Court of Justice, or who shall hereafter be appointed such District Registrar, shall and may be a District Registrar of the said High Court for the purpose of issuing such writs as aforesaid, and having such proceedings taken before him as are hereinafter mentioned :

And whereas by "The Supreme Court of Judicature

Act, 1875," it is provided that where any such Order has been made, two persons may, if required, be appointed to perform the duties of District Registrar in any district named in the Order, and such persons shall be deemed to be joint District Registrars, and shall perform the said duties in such manner as may from time to time be directed by the said Order, or any Order in Council amending the same :

And whereas it has seemed fit to Her Majesty, by and with the advice of Her Privy Council, that there should be District Registrars in certain places in England: Now, therefore, Her Majesty, by and with the advice aforesaid, is pleased to order, and it is hereby ordered, as follows:—

That there shall be District Registrars in the places of LIVERPOOL, MANCHESTER, and PRESTON, and the DISTRICT REGISTRAR AT LIVERPOOL OF THE HIGH COURT OF ADMIRALTY and the DISTRICT PROTHONOTARY at Liverpool of the Court of Common Pleas of Lancaster, shall be and are hereby appointed the District Registrars in Liverpool ;* and the DISTRICT PROTHONOTARY at MANCHESTER of the said Court of Common Pleas shall be and is hereby appointed the District Registrar in Manchester ; and the DISTRICT PROTHONOTARY at PRESTON of the said Court of Common Pleas shall be and is hereby appointed the District Registrar at Preston ; and that the district for each such place shall be the district now assigned to each such District Prothonotary, under the provisions and authority of "The Common Pleas at Lancaster Amendment Act, 1869."

That there shall be a District Registrar in DURHAM, and that the DISTRICT PROTHONOTARY of the Court of Pleas at Durham shall be and is hereby appointed the District Registrar in Durham ; and that the district shall be the district, for the time being, of the County Court holden at Durham.

* Under s. 13 of the Supreme Court of Judicature Act, 1875, see p. 229-44

That, in the places mentioned in the Schedule annexed, there shall be District Registrars, and that the REGISTRAR OF THE COUNTY COURT held in any such place shall be and is hereby appointed the District Registrar in such place, and that the district for each such place shall be the district, for the time being, of the County Court holden at such place.

SCHEDULE.

List of District Registries and Registrars:—

* BANGOR (Jones H. Lloyd)	* KINGSTON-ON-HULL (Messrs. Phillips and Rollitt)
* BARNLEY (Bury, R.)	* KING'S LYNN (Partridge, F. R.)
* BARNSTAPLE (Bencroft, L. T.)	LEEDS (Marshall, T.)
* BEDFORD (Pearce, J.)	LEICESTER (Ingram, T.)
* BIRKENHEAD (Wason, J.)	LINCOLN (Uppleby, F.)
* BIRMINGHAM (Messrs. Guest and Cole)	* LOWESTOFT (Chater, W.)
* BOSTON (Staniland, R. W.)	MAIDSTONE (Scudamure, F.)
* BRADFORD (Robinson, G.)	* NEWCASTLE-UPON-TYNE (Mortimer, W. B.)
* BRIDGEWATER (Lovibond, H.)	* NEWPORT, MONMOUTH (Roberts, W.)
* BRIGHTON (Evershed, E.)	NEWPORT, ISLE OF WIGHT (Blake, F.)
* BRISTOL (Messrs. Harley and Gibbs)	NEWTOWN (Talbot, J. A.)
* BURY ST. EDMUNDS (Collins, T.)	NORTHAMPTON (Dennis, W.)
* CAMBRIDGE (Eaden, J.)	NORWICH (Cooke, G. F.)
* CARDIFF (Langley, R. F.)	NOTTINGHAM (Patchitt, E.)
* CARLISLE (Halton, J. J.)	OXFORD (Bishop, C.)
* CARMARTHEN (Lloyd, W.)	PEMBROKE DOCKS (Owen, G. H.)
* CHELTENHAM (Gale, C. F.)	PETERBOROUGH (Gaches, W. D.)
* CHESTER (Williamson, S.)	* POOLE (Dickinson, H. W.)
* COLCHESTER (Barnes, J. S.)	* PORTSMOUTH (Howard, J.)
* DERBY (Weller, G. H.)	* RAMSGATE (Snowden, T. H. G.)
* DEWSBURY (C. A. Tennant)	* ROCHESTER (Acworth, G. B.)
* DOVER (Fielding, G.)	SHEFFIELD (Messrs. Wake and Rogers)
* DORCHESTER (Symonds, G.)	SHREWSBURY (Peele, C.)
* DUDLEY (Walker, T.)	* SOUTHAMPTON (Walker, H. J.)
* EAST STONEHOUSE (Edmonds, R. G.)	* STOCKTON-ON-TEES (Crosby, T.)
* EXETER (Daw, R. R. M.)	* SUNDERLAND (Ellis, R. K. A.)
* GLOUCESTER (Wilton, F.)	* SWANSEA (Jones, J.)
* GREAT GRIMSBY (Daubeny, W. H.)	* TRURO (Chilcott, J. G.)
* GREAT YARMOUTH (Messrs. Kendall and Woolledge)	* TOTNES (Bryett, T.)
* HALIFAX (Rankin, M. H.)	WAKEFIELD (Mason, H.)
* HANLEY (Challinor, C. E.)	WALSALL (Clarke, F. F.)
* HARTLEPOOL (Strover, J. B.)	* WHITEHAVEN (Were, A. B.)
* HEREFORD (Reynolds, J. J.)	WOLVERHAMPTON (Saunders, F.)
* HUDDERSFIELD (Jones, F. R., jun)	WORCESTER (Crisp, H.)
* IPSWICH (Grimsey, B. P.)	YORK (Perkins, R.)

* The County Courts which have *Admiralty jurisdiction* are all included in the above list. The names of the towns in which they are situate are distinguished by an asterisk.

See as to the District Prothonotaries, s. 78 of the Principal Act, and s. 27 of the Amending Act (pp. 146 and 254).

The following is a list of the new District Registrars in Lancashire:—

LIVERPOOL { Lowndes, F. D. (*D. R. of Court of Admiralty*)
 { Paget, T. E. (*Prothonotary*)

MANCHESTER, Worthington, E. (*District Prothonotary*)

PRESTON, Shuttleworth, T. M. (*District Prothonotary*)

The office of District Prothonotary of Durham is vacant.

The writer has to thank Mr. Henry Nicol, superintendent of the County Courts Department at the Treasury, for kindly settling the above list of District Registrars. He has Mr. Nicol's authority for stating that the proper style of addressing a District Registrar is by his official title, thus:—

“The District Registrar of the High Court of Justice [Bangor],” or as the case may be.

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